FILE COPY

72-227

Supreme Court, U. S.
FILED
AUG 9 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1972.

No. 72-227

JOSEPH WALLER, JR.,
Petitioner,

v.

CITY OF ST. PETERSBURG, FLORIDA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

GARDNER W. BECKETT, JR.,
c/o American Civil Liberties Union,
NELSON, BECKETT, NELSON
& THOMAS,
52 Sixth Street South,
St. Petersburg, Florida. 33701
Attorney for Petitioner.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

INDEX TO BRIEF.

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA	1
JURISDICTION	1
QUESTIONS PRESENTED	2
FEDERAL CONSTITUTIONAL PROVISIONS AND MUNICIPAL ORDINANCE INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT	10
1. Whether or Not the St. Peterburg Municipal Ordinance Making It a Crime "to . . . Verbally Abuse or Make Derogatory Remarks to a Policeman in the Performance of His Duties," Is, Insofar as It Prohibits Speech, Unconstitutionally Overbroad on Its Face Under the Prior Decisions of This Court Applying the First Amendment	10
2. Whether or Not Petitioner's Municipal Conviction and Jail Sentence Which Was Obtained in the Municipal Court of St. Petersburg, Florida, Under a Broad Construction of an Unconstitutionally Overbroad Municipal Ordinance Making It a Crime "to . . . Verbally Abuse or Make Derogatory Remarks to a Police Officer in the Performance of His Duties," May Be Upheld by the Florida Supreme Court by Giving the Challenged Ordinance a Narrow, Constitutionally Acceptable Construction Four Years After the Conviction Has Been Obtained	12
3. Whether or Not Affirmance of Petitioner's Municipal Court Conviction by the Supreme Court of Florida Under Its Construction of the Ordinance in Question, Constitutes a Denial of Due Process Under the Fourteenth Amendment by Reason of the Fact That There Is No Evidence in the Record to Support a Conviction Under Such Construction	15

INDEX TO BRIEF (Continued).

Page

4. Whether or Not the Imposition Upon Petitioner of the "Maximum Sentence" of Ninety Days in Jail on Each of His Three Convictions for "Verbal Abuse," "Obscenity" and "Simple Assault," for the Express Purpose of Punishing Petitioner for His Prior "Militant" Publications and Activities and to "Do Something to Stop It in the Future," Is an Unconstitutional Use of the Sentencing Power of the Municipal Court to Penalize Petitioner for the Exercise of His First Amendment Freedoms and to Intimidate Him and Others From the Future Exercise of Such Freedoms 17

CONCLUSION 18

APPENDIX:

Florida Supreme Court:

Opinion and Judgment A1

Petition for Rehearing A16

Order A19

Florida District Court of Appeal:

Opinion and Judgment A20

Order A24

Pinellas County, Florida, Circuit Court:

Opinion and Order A25

Order A31

Extracts From Trial Transcript A32

TABLE OF CASES CITED.

Page

Bouie v. Columbia (1964), 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697 14

Chaplinsky v. New Hampshire (1951), 315 U. S. 568 .....6, 10, 11, 12, 18

Gooding v. Wilson (1972), U. S. , 31 L. Ed. 2d 408, 92 S. Ct. 10, 18

North Carolina v. Pearce (1969), 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072 17

Shuttlesworth v. Birmingham (1965), 382 U. S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211 13

Shuttlesworth v. City of Birmingham (1968), 394 U. S. 147, 22 L. Ed. 2d 162, 89 S. Ct. 935 13

Thompson v. Louisville (1960), 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624 16

United States v. Jackson (1967), 390 U. S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209 17

MISCELLANEOUS.

	Page
28 U. S. C. Sec. 1257(3)	1
United States Constitution:	
First Amendment	3, 13, 17, 18
Fifth Amendment	17
Fourteenth Amendment	3, 15, 18

Supreme Court of the United States

OCTOBER TERM, 1972.

No. .

JOSEPH WALLER, JR.,

Petitioner,

versus

CITY OF ST. PETERSBURG, FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

Petitioner, Joseph Waller, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Florida in this case, 261 So. 2d 151, a copy of which is appended hereto (Appendix, p. 1, hereafter "A1"). An opinion of the District Court of Appeal of Florida, Second District, is reported at 245 So. 2d 685 (A20). The Circuit Court of Pinellas County, Florida, delivered an unreported opinion (A25).

JURISDICTION.

The judgment of the Supreme Court of Florida was dated and entered on April 12, 1972, and a timely petition for rehearing (A16) was denied without opinion on May 12, 1972 (A19). Jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Whether or not the St. Petersburg, Florida, municipal ordinance making it a crime "to . . . verbally abuse or make derogatory remarks to a policeman in the performance of his duties," is, insofar as it prohibits speech, unconstitutionally overbroad on its face under the prior decisions of this Court applying the First Amendment.

2. Whether or not petitioner's municipal conviction and jail sentence which was obtained in the Municipal Court of St. Petersburg, Florida, under a broad construction of an unconstitutionally overbroad municipal ordinance making it a crime "to . . . verbally abuse or make derogatory remarks to a police officer in the performance of his duties," may be upheld by the Florida Supreme Court by giving the challenged ordinance a narrow, constitutionally acceptable construction four years after the conviction has been obtained.

3. Whether or not affirmance of petitioner's Municipal Court conviction by the Supreme Court of Florida under its construction of the ordinance in question, constitutes a denial of due process under the Fourteenth Amendment by reason of the fact that there is no evidence in the record to support a conviction under such construction.

4. Whether or not the imposition upon petitioner of the "maximum sentence" of ninety days in jail on each of his three convictions for "verbal abuse," "obscenity" and "simple assault," for the express purpose of punishing petitioner for his prior "militant" publications and activities and to "do something to stop it in the future," is an unconstitutional use of the sentencing power of the Municipal Court to penalize petitioner for the exercise of his First Amendment freedoms and to intimidate him and others from the future exercise of such freedoms.

FEDERAL CONSTITUTIONAL PROVISIONS AND MUNICIPAL ORDINANCE INVOLVED.

The First Amendment to the Constitution of the United States reads in full:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States reads in part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The ordinance of the respondent City of St. Petersburg, Florida, under which petitioner was convicted and sentenced to ninety (90) days in jail reads in full:

> "It shall be unlawful for any person to challenge to fight, assault, strike, verbally abuse or make derogatory remarks to a police officer in the performance of his duties."
>
> Ordinance 25.43.1
> City of St. Petersburg, Florida (A5)

STATEMENT OF THE CASE.

"On a night in St. Petersburg, Florida, when there was considerable tension between the white and black elements of the community five police officers in one station wagon were on what one of them termed a 'routine patrol' when they encountered a group of black people who shouted 'Pig' at them. Waller, head of a militant organization called JOMO, for Junta of Military Organizations, had an amplified megaphone, and was the most visible and vocal of the group. The officers radioed for a conference with their lieutenant, who said he would meet them at a corner six blocks away.

"They met and talked about the abuse they were taking, and it was agreed that if the abuse were repeated directly at them that Waller would be arrested for verbal abuse. As one officer put it, 'We were losing quite a bit of face there on 22nd Street.'

"The lieutenant led the way back to the group, and, sure enough, Waller repeated the performance. The lieutenant got out of the car, placed Waller under arrest, but didn't tell him why. At first unresisting, Waller later retaliated by spitting and cursing, and by the time he got to the police station he was charged with verbal abuse, simple assault and use of obscene language." (A20-A21)

The charge on which the arrest was made was later reduced to writing as the offense of "verbal abuse to a police officer" in violation of the above-quoted municipal ordinance. The other charges of "simple assault" and "obscene language" were based upon events occurring after the arrest was made and resulting from the arrest (A4).

Petitioner defended against the "verbal abuse" charge on the ground that the municipal ordinance upon which it was based was void for vagueness and overbreadth under

the First Amendment to the Constitution of the United States insofar as the ordinance made it a criminal offense "to . . . verbally abuse or make derogatory remarks" to a police officer in the performance of his duties.

In considering the constitutionality of the ordinance the Municipal Court made no effort to give the above-quoted portion of the ordinance a narrow, constitutionally permissible construction but gave it a broad construction, ruling that

> ". . . even the defendant Waller admitted the use of the word 'Pig', and that the Court finds constitutes verbal abuse even if it's in its simplest sense of one utterance . . ." (A41)

On appeal the Circuit Court of Pinellas County, Florida, sitting as an appellate court for municipal appeals, likewise made no effort to give a narrow, constitutionally permissible construction but gave it a broad construction, ruling that

> "The history of our society does not provide a time more critical than that facing our cities now and it is beyond comprehension that any intelligent being, that is any being capable of thought processes, could not or would not know that conduct such as that portrayed by the Appellant in the instant case, to-wit the use of the language reflected by the transcript of record-on-appeal, would not be prohibited by the City Ordinance in question, specifically when such language was designed, obviously, to arouse the passions of those within the hearing of such words, inspire hate and derision of the municipal police authorities particularly when such words were being amplified by the use of a powered megaphone." (A29)

On certiorari the District Court of Appeal of Florida, Second District, held the words "verbally abuse" on which the charge against petitioner was based were "unconstitutionally overbroad" (A21) under *Chaplinsky v. New Hampshire* (1951), 315 U. S. 568 and "many other decisions of the Supreme Court," (A22) reasoning that—

> "If it purports to reach all verbal abuse, the ordinance is overbroad. If it does not, it clearly fails to specify what speech is prohibited." (A22)

On certiorari to review this decision the Florida Supreme Court held, contrary to the construction given to the ordinance by the other three courts, that the ordinance in question "on its face" was "more restrictive" than the ordinance upheld in *Chaplinsky v. New Hampshire, supra* (A8), and that it was "more limited and restrictive in scope than any of the ordinances or statutes" which it had considered because

> "the words, taken under the circumstances spoken, must interfere with the officer in the performance of his duty, primarily through incitement to violence and breach of the peace." (A14)

The Florida Supreme Court then made a finding of fact which no other court had made, that

> "In the instant case, the word 'Pig' at the time it was spoken, was a call to violence against the police officers. That word was hurled by defendant through his megaphone—a verbal brickbat. The language here in question had no other significance other than to arouse the crowd to action against the officers." (A14-A15)

The Florida Supreme Court failed to consider that there was no "crowd" present at the time of the arrest

which petitioner might have incited to violence. There was only the ordinary "pedestrian traffic" on the street (A38). Whatever "crowd" came to the scene was attracted there by the spectacle of petitioner's arrest by nine police officers who came to the scene in three patrol cars (A2). Thus the Florida Supreme Court stated, after describing the petitioner's arrest and subsequent events at the scene, that—

> "By this time quite a crowd had collected and, as the officers left the scene with their prisoners, rocks and bottles were thrown by the crowd that had gathered." (A3-A4)

Driving down the street in their three police cars was the only "duty" in the "performance" of which the nine police officers were engaged at the time petitioner was arrested for shouting "Pig, white pig, hey, there's the pigs." (A2). This the officers had been doing all night "on routine patrol" (A2, A20) without any "interference" although petitioner and others had previously shouted "Pig" at them (A2, A20).

The erroneous conclusion perhaps might be drawn from the statement in the Court's opinion that

> "As the Colman car approached, the group moved down from the curb and into the street" (A3),

that petitioner's group somehow blocked or attempted to interfere with the moving police cars, but the record of the trial shows that this is not what happened. What happened is that as petitioner's group of seven or eight people was walking south on the sidewalk on the west side of 22nd Street, the three police cars were coming north on the same street. As petitioner and his group approached an intersecting street (Harrington Avenue) the arresting offi-

cer, Lieutenant Colman, swung his car left and turned into the intersecting street so that the car passed directly in front of petitioner and his group as they stepped from the curb to walk across the intersecting street. Petitioner was continuing to shout into his powered megaphone and thus the full impact of the megaphone went into the car window as it rolled to a stop blocking their path. Some of the group went around the front of the car. Petitioner and others walked around behind it. He was continuing to cross the intersecting street when Lieutenant Colman came up and seized him from behind. Petitioner, although not told why he was being arrested, made no resistance (A34-A35).

As the Supreme Court of Florida noted (A3), there was an affray, not initiated by petitioner, in connection with his arrest and the arrest of others in his group. Separate charges of "obscenity" and "simple assault" were brought against petitioner based on this affray, resulting in his conviction and sentencing to 90 days in jail on each of these charges also, in addition to a 90 day sentence for the "verbal abuse" for which the arrest was made (A4).

The Municipal Court expressly and intentionally imposed upon petitioner "the maximum that I can under the law here. This is ninety days on each charge." The Municipal Court expressly did this to punish petitioner for his political and social views, that is, because of "militancy" in publications which he was "not sure whether you wrote them or not"; because of petitioner's "attitude of resentment of law enforcement"; because of the "situation such as obviously has come into this community" and petitioner's "obviously definite participation in it"; and because "I'm going to deal with it as best I can to see if I can't do something to stop it." (A41-A42)

WHEN AND HOW FEDERAL QUESTION WAS RAISED.

The defense that the "verbal abuse" and "derogatory remarks" ordinance was void for vagueness and overbreadth under the First Amendment to the federal Constitution was first raised by written motion to quash the charge filed in the Municipal Court of St. Petersburg before petitioner pled to the charge of "verbal abuse to a police officer." The motion was denied and the denial was assigned as error by petitioner on appeal. The federal question thus presented has been considered and passed upon by every Florida Court including the Supreme Court of Florida, as its opinion clearly shows.

The constitutional questions number (2) and (3) were raised by actions of the Supreme Court of Florida in its disposition of the case when it reached that Court and thus were raised for the first time by that Court itself and challenged by petitioner on petition for rehearing.

Question (4) was raised by assignment of error on appeal from the Municipal Court to the Circuit Court of Pinellas County, Florida, and thereafter preserved and presented for review in every Florida Court which considered the case.

ARGUMENT.

1. Whether or Not the St. Petersburg Municipal Ordinance Making It a Crime "to . . . Verbally Abuse or Make Derogatory Remarks to a Policeman in the Performance of His Duties," Is, Insofar as It Prohibits Speech, Unconstitutionally Overbroad on Its Face Under the Prior Decisions of This Court Applying the First Amendment.

The decision of the District Court of Appeal of Florida, Second District, that the "verbal abuse" part of the ordinance was void for overbreadth was rendered prior to the decision of this Court in *Gooding v. Wilson* (1972), U. S. , 31 L. Ed. 2d 408, 92 S. Ct. . Even without the benefit of that decision expressly holding that a criminal statute prohibiting "abusive" language to another is void for overbreadth under the prior decisions of this Court, the intermediate Florida appellate court correctly followed those prior decisions and held that the prohibition in the municipal ordinance in this case against "verbal abuse" is equally void for overbreadth. The Supreme Court of Florida, taking note of the *Gooding* decision before announcing its own decision in this case (A13), authoritatively construed the words of the ordinance "to . . . verbally abuse or make derogatory remarks" to be limited to the "fighting words" held to be constitutionally punishable in *Chaplinsky, supra*, a definition reaffirmed in *Gooding*. In describing the facts of the present case as "a classic case of the type of verbal act the Ordinance was designed to prohibit," (A8) the Florida Supreme Court, however, expanded the definition of "fighting words" to include a much broader meaning than the definition given to those words by this Court in *Chaplinsky*. In *Chaplinsky* the facts involved a face-to-face confrontation in which the speaker

spoke *directly* to the addressee and the statute involved had been limited by the Supreme Court of New Hampshire in its prior decisions only to such cases:

> " 'The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace *by the addressee*, . . . ' "
>
> 315 U. S. at 573, 86 L. Ed. at 1036

In the present case Lieutenant Colman was riding down the street in a police car and petitioner was a pedestrian broadcasting to the public at large "Pig, white pig, hey, there's the pigs," while the police car was still a "half a block away." (A2)

The distinction between the *Chaplinsky* "fighting words" and the Florida Supreme Court's definition in this case is further emphasized by the fact that in this case the definition requires that the offensive words be overheard by third persons present because the Florida Supreme Court holds that—

> "Implicit in this Ordinance is the *requirement* that the acts prohibited interfere with the officer in the performance of his duties, primarily through incitement to breach of the peace." (A8, emphasis supplied)

the opinion emphasizing that the ordinance is "not primarily concerned" with the reaction of the police officer,

> "but rather with the reaction of bystanders, friends, family and members of the public who might be incited to action, either against the officer or against the person speaking the words." (A8)

Thus under the Florida Supreme Court's definition of "fighting words" it is not necessary that the police officer as addressee of the words should consider himself "abused"

by them, it being sufficient to violate the ordinance if a third person, hearing the "verbal abuse" or the "derogatory remarks" to the police officer, attacks either the police officer or the speaker. It was this kind of an elastic and expansive definition of verbal abuse, even taking into account the reaction of third persons, that this Court held overbroad in *Gooding, supra,* for the reason that a test of this kind " 'licenses the jury to create its own standard in each case.' " U. S. , 31 L. Ed. 2d at 417.

The conclusion follows that under the expanded definition given to "fighting words" by the Florida Supreme Court, the ordinance in question continues to be unconstitutionally overbroad under the decisions of this Court.

2. Whether or Not Petitioner's Municipal Conviction and Jail Sentence Which Was Obtained in the Municipal Court of St. Petersburg, Florida, Under a Broad Construction of an Unconstitutionally Overbroad Municipal Ordinance Making It a Crime "to . . . Verbally Abuse or Make Derogatory Remarks to a Police Officer in the performance of His Duties," May Be Upheld by the Florida Supreme Court by Giving the Challenged Ordinance a Narrow, Constitutionally Acceptable Construction Four Years After the Conviction Has Been Obtained.

The Florida Supreme Court apparently felt that because it had authoritatively construed the ordinance in question to be limited to "fighting words" as defined in *Chaplinsky, supra* (a result which petitioner has heretofore disputed), it could retroactively apply its "narrow" construction of the ordinance to petitioner's conviction obtained under a broad construction four years previously in the municipal court and thus affirm petitioner's conviction. In so doing, as petitioner pointed out on petition for

rehearing (A16), the Florida Supreme Court failed to give effect to the doctrine of *Shuttlesworth v. City of Birmingham* (1968), 394 U. S. 147, 22 L. Ed. 2d 162, 89 S. Ct. 935, that a conviction obtained in a municipal court upon a broad construction of a municipal ordinance, which is unconstitutional under the First Amendment as so construed, may not, four years later, be upheld by a State Supreme Court by the placing by the State Supreme Court of a narrow construction upon such ordinance under which it is no longer void for overbreadth, especially where, as in the present case, an intermediate appellate court of the state has in the meantime declared the offending ordinance unconstitutionally overbroad on its face under the applicable decisions of this Court.

This rule of due process was earlier emphasized by this Court in the related case of *Shuttlesworth v. Birmingham* (1965), 382 U. S. 87, 15 L. Ed. 2d 176, 86 S. Ct. 211, where another conviction of Shuttlesworth under an unconstitutionally overbroad ordinance was affirmed by the Court of Appeals of Alabama after it had first placed upon the ordinance a narrow, constitutionally acceptable construction. In reversing the conviction thus obtained this Court said:

> "The trial court made no findings of fact and rendered no opinion. For all that appears, that Court may have found the petitioner guilty only by applying the literal —and unconstitutional—terms of the ordinance. . . . Because we are unable to say that the Alabama courts in this case did not judge the petitioner by an unconstitutional construction of the ordinance, the petitioner's conviction . . . cannot stand."
>
> 382 U. S. at 92, 15 L. Ed. 2d at 180,

Unlike *Shuttlesworth*, the record in the present case removes all doubt that petitioner here was convicted in the

municipal court of St. Petersburg, Florida, and his conviction was affirmed by the Circuit Court of Pinellas County, Florida, with both courts giving the "verbal abuse" ordinance a broad—and unconstitutional—construction. The Supreme Court of Florida undertook to validate the ordinance by giving it a narrow construction under which this Court stated that "[i]mplicit" in the ordinance was the "requirement" that the verbal abuse "interfere" with the officer in the "performance" of his duties. The Court then made a finding of fact on this issue which none of the lower courts, unaware of this "requirement," had thought to be an issue in the case.

The conclusion follows that even if the ordinance in question has now been given a narrow, constitutionally acceptable construction by the Florida Supreme Court (a result which petitioner disputes), such construction can operate only prospectively in future cases and petitioner's present conviction obtained upon an unconstitutional and now discarded construction cannot stand.

The same result is required by *Bouie v. Columbia* (1964), 378 U. S. 347, 12 L. Ed. 2d 894, 84 S. Ct. 1697, where this Court, in overturning a municipal conviction which had been upheld by the Supreme Court of South Carolina on the basis of its construction of a criminal statute made after the municipal conviction had been obtained, said:

> "Even where vague statutes are concerned, it has been pointed out that the vice in such an enactment cannot 'be cured in a given case *by a construction in that very case* placing valid limits on the statute,' for the objection of vagueness is two-fold: inadequate guidance to the individual whose conduct is regulated, and inadequate guidance to the triers of fact."
>
> 378 U. S. at 352-3, 12 L. Ed. 2d 899, (emphasis supplied)

Both vices are present here. If petitioner had been advised that "Pig, white pig, hey, there's the pigs," were "fighting words" because a member of the public might be incited to breach the peace upon hearing them, he might have used different words. Likewise, if the municipal court had tried the case under the Supreme Court's construction of the ordinance, petitioner might have been acquitted.

This points up another defect in procedure followed by the Florida Supreme Court: by acting as a trier of fact, the Florida Supreme Court effectively denied to petitioner the right of appellate review of this finding of fact and thereby, contrary to the Fourteenth Amendment, denied him the equal protection of Florida law which guarantees him a right of appellate review of original findings of fact made by a Municipal Court.

3. Whether or Not Affirmance of Petitioner's Municipal Court Conviction by the Supreme Court of Florida Under Its Construction of the Ordinance in Question, Constitutes a Denial of Due Process Under the Fourteenth Amendment by Reason of the Fact That There Is No Evidence in the Record to Support a Conviction Under Such Construction.

The placing by the Florida Supreme Court of a narrow construction upon the ordinance in question so that the *interference* with a police officer in the performance of his duties, "primarily through incitement to breach of the peace" became a "requirement" which was "[i]mplicit in this Ordinance" (A8), raised for the first time the question of whether or not this requirement had been satisfied by proof that petitioner directly obstructed the officers in the performance of their duties, or indirectly did so by inciting other persons to do so. Since this element of proof was first announced by the Florida Supreme Court after peti-

tioner was convicted, the Municipal Court had no occasion to make a finding of fact on this issue and did not do so. The Florida Supreme Court made no finding of fact that petitioner directly obstructed or interfered with Lieutenant Colman or any other police officer. That Court did, for the first time in the case, make a finding of fact that the ordinance was indirectly violated by petitioner because "A crowd was attracted to the scene and incited to violence against the officers." (A8). This "crowd" was attracted by the *arrest*, however, and not by petitioner's use of his powered megaphone prior to the arrest. At the time of petitioner's arrest there was only the usual "pedestrian traffic" in the street according to Lieutenant Colman (A38) who made the arrest using three police cars and a total of nine police officers including himself (A2). According to Lieutenant Colman the extent of the involvement of these pedestrians was that their attention was attracted and that they were "looking at us" (A37). In short, there is no evidence in the record to support the essential finding of fact that there was a "crowd" assembled before petitioner was arrested or that his broadcasting of the message "Pig, white pig, hey, there's the pigs," had "incited" anybody to do anything other than to cause Lieutenant Colman to decide to arrest him for "verbal abuse to a police officer." It has been settled since *Thompson v. Louisville* (1960), 362 U. S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624, that a conviction based upon no evidence cannot stand. In *Shuttlesworth, supra*, that principle was applied to a finding of fact made necessary by a narrow construction placed upon a municipal ordinance by an appellate court, as in the present case, after a conviction had been obtained under a broad, unconstitutional construction under which such a finding was unnecessary, and this Court again reversed the conviction, summarizing,

"There was thus no evidence whatever in the record to support the petitioner's conviction under this ordinance as it has been authoritatively construed by the Alabama Court of Appeals. It was a violation of due process to convict and punish him without evidence of his guilt." 382 U. S. at 95, 15 L. Ed. 2d at 182.

4. Whether or Not the Imposition Upon Petitioner of the "Maximum Sentence" of Ninety Days in Jail on Each of His Three Convictions for "Verbal Abuse," "Obscenity" and "Simple Assault," for the Express Purpose of Punishing Petitioner for His Prior "Militant" Publications and Activities and to "Do Something to Stop It in the Future," Is an Unconstitutional Use of the Sentencing Power of the Municipal Court to Penalize Petitioner for the Exercise of His First Amendment Freedoms and to Intimidate Him and Others From the Future Exercise of Such Freedoms.

Petitioner has found no cases directly on point, perhaps because it is not usual for a court in sentencing frankly to state, as the Municipal Court did in this case, that the "maximum" sentence was being imposed to punish petitioner for his political and social views previously expressed and to prevent him and others from similar expressions and activities in the future. Decisions of this Court, however, establish the rule that Fifth Amendment and other federally secured rights of the individual cannot be inhibited by state courts by the imposition of a more severe punishment solely because those rights have been exercised. *United States v. Jackson* (1967), 390 U. S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209. *North Carolina v. Pearce* (1969), 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072. On principle the rule should be applied with greater vigor where the rights involved are the First Amendment freedoms of speech and of the press, as they are in petitioner's case.

CONCLUSION.

Although the Supreme Court of Florida attempted to validate the "verbal abuse" and "derogatory remarks" ordinance by limiting it to "fighting words" under *Chaplinsky* and *Gooding*, the expanded definition it gave to the term "fighting words" shows that the ordinance is still overbroad and unconstitutional under the decisions of this Court, and thus petitioner's conviction under it cannot stand.

Even if the ordinance as construed by the Florida Supreme Court is now constitutionally acceptable, petitioner's conviction, obtained upon a prior, unconstitutional construction thereof, cannot, under prior decisions of this Court, be sustained by a retroactive application of the subsequent, constitutional construction.

There is no evidence in the record to support the essential element of proof, as construed by the Florida Supreme Court, that the "verbal abuse" for which petitioner was arrested incited anyone to breach the peace.

The imposition by the Municipal Court upon petitioner of the "maximum" ninety day sentence on each of his three convictions for the express purpose of punishing petitioner's prior exercise of his First Amendment freedoms and of preventing their future exercise by him and others, violates the First and Fourteenth Amendments and is invalid.

For these reasons the judgment of the Supreme Court of Florida should be reversed and the judgment of the District Court of Appeal of Florida, Second District, reinstated.

GARDNER W. BECKETT, JR.,
Of Counsel for Petitioner
Joseph Waller, Jr.

Appendix.

OPINION AND JUDGMENT.

IN THE
SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1972.

CASE NO. 41,080.

CITY OF ST. PETERSBURG,
A MUNICIPAL CORPORATION,
Petitioner,

v.

JOSEPH WALLER, JR.,
Respondent.

Opinion filed April 12, 1972.

Writ of Certiorari to the District Court of Appeal, Second District.

Carl R. Linn, Assistant City Attorney, for Petitioner.
Gardner W. Beckett, Jr. of Nelson, Beckett, Nelson & Thomas, for Respondent.

BOYD, *J.*

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Second District, reported at 245 So. 2d 685. Jurisdiction is based on conflict between the decision sought to be reviewed and *Nixon v. State.*[1]

1. 178 So. 2d 620 (Fla. App. 3rd) 1965; cert. denied 385 U. S. 853 (1966).

Respondent, defendant below, is the leader of a militant organization called JOMO, for Junta of Military Organization. On the night of August 14, 1968, defendant and a group of JOMO members left their headquarters on Harrington Avenue South in the City of St. Petersburg and went looking for the police following a report that a person named Loretta Munderlyn had been arrested on 22nd Street and 7th Avenue. Defendant had with him an amplified megaphone and his followers wore the distinctive dress or uniform of their organization. A police cruiser on routine patrol first spotted the group gathered at the corner of 22nd Street and 9th Avenue. As the police car approached, people in the group yelled, "Here come the pigs. Here they come. Look at the pigs." As the car came closer the crowd began to chant, "Pig, pig." On reaching the corner of 22nd Street and 9th Avenue, abreast of the group, the cruiser slowed to a stop for a red light. At this point, defendant Waller stepped into the street, thrust his megaphone close to the front right-hand window of the police car and yelled, "Pig. White pig. Sooey, sooey." The megaphone was described as "very loud" and sufficient to be heard for blocks away. Other members of the group behind the defendant yelled, "Pig" and various obscenities at the officers in the car.

The officers radioed for a conference with the shift Lieutenant, Lieutenant Colman, who met them at a corner six blocks away. Lieutenant Colman in a patrol car with one other officer then proceeded to the scene followed by the car that had first encountered the group. A third police car subsequently arrived so that there were a total of nine officers at the scene.

As Lieutenant Colman's car approached the group on the corner of 22nd Street, they could hear from half a block away the words, "Pig, white pig, hey, there's the pigs," shouted in their direction through a sound-powered mega-

phone. Defendant was using the megaphone and was the most vocal and noticeable member of the group. As the Colman car approached, the group moved down from the curb and into the street. Defendant again directed the megaphone very close to the cruiser and yelled through it at the officers inside. Some of the individuals in the group started around to the front of the car and others, including the defendant, went to the rear of the car. Lieutenant Colman met the defendant at the rear of the car and arrested him, holding him with a nightstick placed across his body and grasped at either end. Thus restrained, the defendant offered no immediate resistance. By this time the second carload of officers had arrived at the scene. Lieutenant Colman started walking Waller back to the car and sought to turn him over to Sergeant Mein so that he, Colman, could turn his attention to other individuals of the group. As soon as Lieutenant Colman released defendant, a scuffle broke out and the defendant became very vocal again, shouting obscenities in a loud voice and attracting other onlookers to the area. Officer Hanson assisted Sergeant Mein who was struggling with the defendant. The defendant continued cursing, yelling, spitting on the officers and yelling "White M—F—" and similar obscenities. At this point, the defendant's sister broke from the crowd and grabbed one of the officers from behind. She was yelling various obscenities at the officers and was subsequently arrested. While she was struggling with the officers who were arresting the defendant, another member of defendant's group, one Fred Hamilton, broke from the crowd and grabbed Officer Hanson. During the struggle Officer Hanson's gun was unstrapped and pulled half-way from the holster before Officer Trappman came to his assistance and arrested Hamilton.

By this time quite a crowd had collected and, as the officers left the scene with their prisoners, rocks and bottles

were thrown by the crowd that had gathered. During the ride back to the police station, defendant became violent and kicked Officer Murphy, spit in his face and cursed him with various obscenities.

Defendant was charged with (1) simple assault in violation of City Ordinance 25.4; (2) obscene language in violation of City Ordinance 25.42; and (3) verbal abuse of a police officer in violation of City Ordinance 25.43.1. At the trial, defendant admitted yelling "Pig" at the police officers through the megaphone, but only after he was arrested. He denied resisting arrest, claimed he was subjected to police brutality and contended that the arrest was illegal because at the time of the arrest he was not informed of the offense against him. His counsel contended at the trial that because of defendant's reputation as a known trouble-maker, the police were out to get him and that the increased police activity in the area, including surveillance of the JOMO headquarters constituted "provocation" for the incident. It was argued that the return of the police officers to the scene where the group was yelling "Pig" constituted entrapment, since the police thereby brought themselves "into the ambit of those words." Defendant also contended that the Ordinance proscribing verbal abuse of a police officer was unconstitutionally vague.

Defendant was tried in the Municipal Court before the Honorable Henry Esteva and found guilty on all three charges. He was sentenced to ninety (90) days' imprisonment on each of the three charges. On appeal, the Circuit Court affirmed the conviction.

Defendant sought certiorari in the District Court and was successful in having Ordinance Section 25.43.1 declared unconstitutionally overbroad and specifically the language "verbal abuse" void. The District Court directed discharge of the defendant on the charge of verbal abuse and ordered a new trial on the other two convictions. The

United States Supreme Court decision in *Chaplinsky v. New Hampshire*[2] was distinguished and the District Court found that other decisions of the United States Supreme Court commanded a declaration of the Ordinance's invalidity.[3]

The Ordinance in question in the instant case is Ordinance 25.43.1 of the City of St. Petersburg, which provides as follows:

> "It shall be unlawful for any person to challenge to fight, assault, strike, verbally abuse or make derogatory remarks to a police officer in the performance of his duties."

A similar ordinance was held valid in *Nixon v. State*,[4] thereby creating jurisdictional conflict.

The District Court in the instant case correctly stated the test for constitutionality of a statute or ordinance of the type here involved as whether the language "is sufficiently precise to describe an offense so as to give fair warning to the citizen that certain speech is prohibited."[5]

The rule is stated by the United State Supreme Court in *U. S. v. National Dairy Products*, as follows:[6]

---

2. 315 U. S. 568 (1942).

3. *Stromberg v. California*, 283 U. S. 359 (1931); *Hague v. C. I. O.*, 307 U. S. 496 (1938); *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Winters v. N. Y.*, 333 U. S. 507 (1948); *Cox v. Louisiana*, 379 U. S. 536 (1965); *Dombrowski v. Pfister*, 380 U. S. 479 (1965); *Ashton v. Kentucky*, 384 U. S. 195 (1966).

4. 178 So. 2d 620, 621 (Fla. App. 3rd 1965), cert. denied 385 U. S. 853 (1966): "Any person in the city shall be deemed guilty of disorderly conduct who: * * * 7. Uses obscene or profane language in the presence of anyone else, or any indecent, insulting or *abusive language* to another, or makes any threats of violence against another person." (e.s.).

5. *Waller v. City of St. Petersburg*, 245 So. 2d 685, 687 (Fla. App. 2d 1971).

6. 372 U. S. 29, 32 (1963).

> "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed."

In a leading case, *Chaplinsky v. New Hampshire*,[7] the United States Supreme Court upheld the following ordinance against the charge of vagueness:

> "No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation."

Chaplinsky, a member of a sect known as Jehovah's Witnesses, was distributing the literature of his sect on a busy street in the City of Rochester and denouncing all religion as a "racket." The crowd was getting restless. A traffic officer on duty at the intersection started with Chaplinsky for the police station. On the way they met a Marshal who had been advised that a riot was imminent and was hurrying to the scene. On meeting the Marshal, Chaplinsky addressed the following words to him:

> "You are a God damned racketeer and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists. . . ."

Chaplinsky was tried and convicted of violation of the Ordinance. His conviction was affirmed by the state courts and by the United States Supreme Court, stating:[8]

---

7. 315 U. S. 568 (1942).
8. Id. at 571.

"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. 'Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.' Cantwell v. Connecticut, 310 US 296, 309, 310."

Of importance to the decision upholding the Ordinance in *Chaplinsky* was the restrictive construction placed on that Ordinance by decisions of the New Hampshire Court.[9] The Supreme Court concluded that the Ordinance, as construed by the State Court, was limited to verbal acts

9. Id. at 573: "On the authority of its earlier decisions, the state court declared that the statute's purpose was to preserve the public peace, no words being 'forbidden except such as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed.' It was further said: 'The word "offensive" is not to be defined in terms of what a particular addressee thinks . . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight . . . . The English language has a number of words and expressions which by general consent are "fighting words" when said without a disarming smile.' . . . ."

uttered under such circumstances as were likely to cause a breach of the peace. The Court held that the words used by Chaplinsky "are epithets likely to provoke the average person to retaliation and thereby cause a breach of the peace."[10]

We note that the Ordinance of the City of St. Petersburg, on its face, is more restrictive than the Ordinance of the City of Rochester upheld in the *Chaplinsky* case, *supra*, in that the St. Petersburg Ordinance prohibits certain conduct and verbal acts directed to a police officer in the performance of his duty. Implicit in this Ordinance is the requirement that the acts prohibited interfere with the officer in the performance of his duties, primarily through incitement to breach of the peace.

The facts before us present a classic case of the type of verbal act the Ordinance was designed to prohibit. Defendant might as well have yelled "Fire" in a crowded theater as yell "Pig" under the facts of this case. His words were calculated to, and in this case, did, in fact, interfere with the officers in the performance of their duty. A crowd was attracted to the scene and incited to violence against the officers.

The Ordinance before us seeks to prevent breach of the peace likely to result from ridicule and abuse of an officer, a symbol of the law enforcement authority of government, while he is in the performance of his duty. The Ordinance is not primarily concerned with offense to the sensibility of individual police officers, but rather with the reaction of bystanders, friends, family and members of the public who might be incited to action, either against the officer or against the person speaking the words. Again, the instant case is clearly illustrative of the type of situation covered by the Ordinance.

---

10. Id. at 574.

The District Court found the words "verbal abuse" vague and overbroad. We disagree. The average man of normal intelligence would understand the meaning of the words. Listing of specific words constituting verbal abuse is not required for obvious reasons.[11] This Court can take judicial notice of what is common knowledge that the word "pig" has, in recent times, come to be used as a derisive name for the police. The same word when applied to a domesticated farm animal or, in jest, to a person who overeats, is not a "fighting word." It is the context within which the word is used which determines its import. "For everything there is a season and a time for every matter under heaven."[12]

In *Youngdahl v. Rainfair, Inc.*,[13] the United States Supreme Court was concerned with whether the use of the word "scab" by strikers was protected speech under the First Amendment of the Constitution, and held it was not, stating:[14]

> "The issue here is whether or not the conduct and language of the strikers were likely to cause physical violence. Petitioners urge that all of this abusive language was protected and that they could not, therefore, be enjoined from using it. We cannot agree. Words can readily be so coupled with conduct as to provoke violence. * * * Petitioners contend that the words

11. *Campbell v. State*, 240 So. 2d 298, 299 (Fla. 1970): "The particular words complained of, 'unnecessarily or excessively' are not vague when considered in the context of the entire Statute and with a view to effectuating the purpose of the act. The fact that specific acts of chastisement are not enumerated, an impossible task at best, does not render the statutory standard void for vagueness. Criminal laws are not 'vague' simply because the conduct prohibited is described in general language."

12. Ecclesiastes 3:1.

13. 355 U. S. 131 (1957).

14. Id. at 138.

> used, principally 'scab' and variations thereon, are within a protected terminology. *But if a sufficient number yell any word sufficiently loudly showing an intent to ridicule, insult or annoy, no matter how innocuous the dictionary definition of that word, the effect may cease to be persuasion and become intimidation and incitement to violence.*" (Emphasis supplied.)

In another decision, *Feiner v. New York*,[15] the United States Supreme Court upheld the disorderly conduct conviction of a student who addressed a crowd in the City of Syracuse, New York, through a loudspeaker making "derogatory remarks" concerning political officials and giving "the impression that he was endeavoring to arouse the Negro people against the whites."[16] In upholding Feiner's conviction under § 722 of the Penal Law of New York,[17] the United States Supreme Court stated:[18]

> "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. Nor in this case can we condemn the considered judgment of three New York courts approving the means which the police, faced with a crisis, used in the exercise of their power and duty to preserve peace and order. * * *"

---

15. 340 U. S. 315 (1950).

16. Id. at 317.

17. "Section 722. Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct: (1) Uses offensive, disorderly, threatening, *abusive or insulting language,* conduct or behavior; * * *." (e.s.)

18. 340 U. S. 315, 321 (1950).

The *Feiner* decision was recently relied on by the United States Circuit Court of Appeals, Tenth Circuit, in *Benson v. Rich*,[19] to affirm the action of local officials in preventing circulation of a leaflet during an Indian ceremonial at Gallup, New Mexico. The leaflet was printed by four Navajo Indians and stated, inter alia, "When our grandfathers carried guns, they were free and they were people." The leaflet was viewed by local officials as a "call to arms" and its distribution was halted to prevent possible disorders. The Circuit Court of Appeals affirmed the action of the officials in preventing the distribution of the leaflet, holding:[20]

> "The right of free speech does not mean that everyone with opinions or views may express them at any public place or at any time. 'The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. * * *.'"

The United States District Court in *Turner v. LaBelle*,[21] upheld Connecticut Statute Section 53-44, which subjects to criminal penalties anyone who "advocates, encourages, justifies, praises, incites, or solicits any assault upon * * * the police force of this or any other state * * * or the killing or injuring or any class or body of persons, or of any individual * * *." Turner and three others were charged with violating the foregoing Statute as the result of speeches made at a public meeting in Hartford, Connecticut. The language held to violate the Statute included the following:[22]

---

19. 448 F. 2d 1371 (CCA 10th 1971).
20. Id. at 1373.
21. 251 F. Supp. 443 (DCD Conn. 1966).
22. Id. at 445.

> "Now I tell you, you treat every cop as your enemy, whether he's white or black until things in America wakes up, until America wakes up. If I can't be imported back, then kill me, kill me, or I'll kill you, anyone that's black is so very angry * * * that he wants to fight, that he wants to shoot, well then, only turn your eyes to the left, to the blue shirts."

The United States District Court read the words of the Statute "justifies" and "praises" in the sense of "encourages," "advocates," and "incites" and held:[23]

> "Thus read, the statute is neither overbroad nor vague, nor does it, though precise, penalize constitutionally protected conduct. *To encourage an assault on a policeman or individual is 'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest* * * *.'" (Emphasis supplied.)

The fact that "marginal" factual situations may arise under a statute or ordinance does not, in itself, render the enactment vague.[24] In *Williams v. U. S.*[25] the United States Supreme Court upheld § 20 of the United States Criminal Code[26] which provides:

> "Whoever, under color of any law, statute, ordinance, regulation, or custom, willfully subjects, or causes to be subjected, any inhabitant of any State Territory, or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution

---

23. Id. at 446.

24. *Roth v. U. S.*, 354 U. S. 476, reh. den. 355 U. S. 852 (1957); *U. S. v. National Dairy Products Corp.*, 372 U. S. 29, reh. den. 372 U. S. 961 (1963).

25. 341 U. S. 97 (1951).

26. 18 U. S. C. § 242.

> and laws of the United States, . . . , shall be fined not more than $1,000, or imprisoned not more than one year, or both."

In affirming a conviction under the foregoing act, the United States Supreme Court held:[27]

> "Many criminal statutes might be extended to circumstances so extreme as to make their application unconstitutional. Conversely, . . . , a close construction will often save an act from vagueness that is fatal. The present case is as good an illustration as any. * * * This is the classic use of force to make a man testify against himself. * * * Some day the application of § 20 to less obvious methods of coercion may be presented and doubts as to the adequacy of the standard of guilt may be presented."

A few days ago, on March 23, 1972, the United States Supreme Court released its decision in *Gooding v. Wilson*[28] reaffirming its adherence to the doctrine of *Chaplinsky v. New Hampshire*, supra. A Georgia Statute[29] was stricken because the appellate courts of Georgia failed to limit the language of the Statute to "fighting words" as required by the *Chaplinsky* case. The United States Supreme Court found that the Georgia Court had construed the Statute in such a way as to cover "words offensive to some who hear them."[30] The United States Supreme Court stated:[31]

---

27. 341 U. S. 97, 101 (1951).

28. 40 U. S. L. Week 4329 (U. S. March 23, 1972).

29. Ga. Code § 26-6303: "Any person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."

30. 40 U. S. L. Week 4329, 4332 (U. S. March 23, 1972).

31. Ibid.

"We conclude that '[t]he separation of legitimate from illegitimate speech calls for more sensitive tools than [Georgia] has supplied.' *Speiser v. Randall, supra,* at 525. The most recent decision of the Georgia Supreme Court, *Wilson v. State, supra,* in rejecting appellee's attack on the constitutionality of § 26-6303, stated that the statute 'conveys a definite meaning as to the conduct forbidden, measured by common understanding and practice.' * * * *Because earlier appellate decisions applied § 26-6303 to utterances where there was no likelihood that the person addressed would make an immediate violent response, it is clear that the standard allowing juries to determine guilt 'measured by common understanding and practice' does not limit the application of § 26-6303 to 'fighting' words as defined by Chaplinsky.*" (Emphasis supplied.)

The Ordinance of the City of St. Petersburg, presently under consideration, is more limited and restrictive in scope than any of the ordinances or statutes in the authorities cited. It prohibits verbal assault, as well as physical or bodily assault, on a police officer in the performance of his duties. We construe the verbal acts prohibited as strictly limited to words having a direct tendency to cause acts of violence, the "fighting words" recognized by *Chaplinsky* as one step away from violence. Mere displeasure, annoyance or resentment is not sufficient. As we have indicated, the words, taken under the circumstances spoken, must interfere with the officer in the performance of his duty, primarily through incitement to violence and breach of the peace.

In the instant case, the word "Pig", at the time it was spoken, was a call to violence against the police officers. That word was hurled by defendant through his megaphone—a verbal brickbat. The language here in question

had no other significance other than to arouse the crowd to action against the officers.

We have also considered defendant's other contentions and find them to be without merit. Since § 25.43.1 of the City Code is valid, defendant's arrest thereunder was valid. The Circuit Court correctly found in its order on appeal that it was not necessary for the officer to inform the defendant of the charge against him at the time he was arrested, since defendant was then in the process of committing the offense. Florida Statutes § 901.17 provides that a person arrested be informed of the cause of his arrest "unless the person to be arrested is then engaged in the commission of an offense. . . ."

Defendant does not question the validity of the other ordinances under which he was convicted. He does suggest, however, that his actions should constitute only one offense, rather than three. We find no basis for this argument. It is clear that a series of incidents, such as those involved in the instant case, may give rise to more than one violation of the law. We note that in the recent United States Supreme Court decision of *Gooding v. Wilson*, supra, the defendant, as a result of his activities during a "demonstration" was charged with two counts of assault and battery, two counts of using abusive language under State law and two charges of violation of Federal law.[32]

Accordingly, petition for writ of certiorari is granted, the decision of the District Court of Appeal is quashed and the cause remanded with directions to remand for reinstatement of the trial court's judgment.

It is so ordered.

ROBERTS, *C. J.*, ERVIN, CARLTON and DEKLE, *JJ.*, concur.

---

32. Wilson's convictions for (1) attempting to interfere with the administration of the Universal Military and Training Service Act in violation of 50 U. S. C. App. § 462(a) and for (2) willfully injuring property of the United States, in violation of 18 U. S. C. § 1361, were affirmed in *Tillman v. U. S.*, 406 F. 2d 930 (CCA 5th 1969).

PETITION FOR REHEARING.

IN THE
SUPREME COURT OF FLORIDA

CASE No. 41,080.

CITY OF ST. PETERSBURG,
A MUNICIPAL CORPORATION,
Petitioner,

v.

JOSEPH WALLER, JR.,
Respondent.

The respondent petitions the Court to reconsider its opinion and decision dated April 12, 1972, on the following grounds:

1. In finding it had jurisdiction based upon a direct conflict between the decision in this case and the decision in *Nixon v. State* (Fla. App. III, 1965), 178 So. 2d 620, the Court possibly failed to consider that the words held in *Nixon* not to be void for overbreadth were the words "obscene . . . language," whereas the words held by the District Court in the present case to be overbroad were the words "verbally abuse," and that a determination that the former are not unconstitutionally overbroad does not directly conflict with a determination that the latter are so.

2. In construing the ordinance in this case to be "more restrictive" than the ordinance in the *Chaplinsky* case (page 7 of the Court's opinion) and holding at the same time that "the instant case is clearly illustrative of the type of situation covered by the Ordinance," (page 8), the

Court may have overlooked the fact that the ordinance in *Chaplinsky* was expressly limited by the Supreme Court of New Hampshire to words having a "*direct tendency* to cause *acts of violence* by *the person* to whom *individually* the remark is addressed" (emphasis added) in a "face-to-face" situation, 315 U. S. 573, and that the words upon which the defendant was convicted in the instant case included words spoken when the arresting officer, Lieutenant Colman, was riding in a police cruiser a half a block away, the municipal judge expressly ruling that the word "pig" "constitutes verbal abuse even if its in its simplest sense of one utterance." (Transcript of Trial, 156).

3. In narrowly construing and upholding in 1972 the constitutionality of the ordinance under which petitioner was convicted in 1968, the Court possibly failed to consider

a) that petitioner's 1968 conviction was based upon a broad construction of the ordinance, the municipal court having held at that time that the word "pig" constituted "verbal abuse even if it's in its simplest sense of one utterance." (Trial Transcript, p. 156).

b) that the *Chaplinsky* doctrine does not apply retroactively to validate a conviction under a narrow construction placed upon an ordinance regulating First Amendment freedoms after the conviction has been obtained without regard to such narrow construction. *Shuttlesworth v. City of Birmingham*, (1968), 394 U. S. 147, 22 L. Ed. 2d 162, 89 S. Ct. 935, and

c) that *Stromberg v. California* (1931), 283 U. S. 359, 75 L. Ed. 1117, 51 S. Ct. 532, 73 ALR 1484, and cases following it invalidate all convictions involving speech where the verdict is a general one or it is otherwise impossible to ascertain that the conviction does not rest upon an unconstitutionally overbroad construction of the penal

legislation involved or other impermissible infringements of First Amendment freedoms. See *Street v. New York* (1969), 394 U. S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354.

GARDNER W. BECKETT, JR.,
Of Counsel for Respondent.

NELSON, BECKETT, NELSON & THOMAS,
52 Sixth Street South,
St. Petersburg, Florida 33701

ORDER.

IN THE

SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1972

Friday, May 12, 1972

CASE NO. 41,080.

CITY OF ST. PETERSBURG,
A MUNICIPAL CORPORATION,

Petitioner,

v.

JOSEPH WALLER, JR.,

Respondent.

On consideration of the Petition for Rehearing filed by attorneys for Respondent,

IT IS ORDERED by the Court that said Petition be, and the same is hereby, denied.

ROBERTS, *C. J.*, ERVIN, CARLTON, BOYD and DEKLE, *JJ.*, Concur.

cc: Hon. C. L. Dillahunty, Clerk
Hon. Harold Mullendore, Clerk
Hon. Carl R. Linn
Hon. Gardner W. Beckett, Jr.

A True Copy
TEST:

(Seal)
SID J. WHITE,

Clerk Supreme Court.

(I HAVE TODAY MAILED TO THE CLERK OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, MANDATE IN THE ABOVE CAUSE. I HAVE ALSO RETURNED ORIGINAL RECORD.)

OPINION AND JUDGMENT.

IN THE

DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT.

JANUARY TERM, A. D. 1971.

CASE NO. 69-407.

JOSEPH WALLER, JR.,

Petitioner,

v.

CITY OF ST. PETERSBURG,

A MUNICIPAL CORPORATION,

Respondent.

Opinion filed March 5, 1971.

Petition for Writ of Certiorari to the Circuit Court of Pinellas County; Robert L. Williams, Judge.

Gardner W. Beckett, of Nelson, Beckett, Nelson & Thomas, St. Petersburg, for Petitioner.

Carl R. Linn, Assistant City Attorney, St. Petersburg, for Respondent.

MANN, *Judge.*

On a night in St. Petersburg when there was considerable tension between the white and black elements of the community five police officers in one station wagon were on what one of them termed a "routine patrol" when they encountered a group of black people who shouted "Pig" at them. Waller, head of a militant organization called JOMO, for Junta of Military Organizations, had an amplified megaphone, and was the most visible and vocal of the group. The officers radioed for a conference with their lieutenant, who said he would meet them at a corner six blocks away.

They met and talked about the abuse they were taking, and it was agreed that if the abuse were repeated directly at them that Waller would be arrested for verbal abuse. As one officer put it, "We were losing quite a bit of face there on 22nd Street."

The lieutenant led the way back to the group, and, sure enough, Waller repeated the performance. The lieutenant got out of the car, placed Waller under arrest, but didn't tell him why. At first unresisting, Waller later retaliated by spitting and cursing, and by the time he got to the police station he was charged with verbal abuse, simple assault and use of obscene language.

He was convicted on all three counts, appealed and lost and seeks certiorari here.

Waller contends here, as in the trial court and Circuit Court, that St. Petersburg ordinance § 25.43.1, which makes it "unlawful for any person to challenge to fight, assault, strike, *verbally abuse* or make derogatory remarks to a police officer in the performance of his duties," is unconstitutionally vague and void. He argues as to the second and third offenses that they sprang out of the unlawful arrest for the first and are invalid as a consequence.

The ordinance is unconstitutionally overbroad. It is not at all like that upheld by this court in Calbeck v. St. Petersburg, 1959, 114 So. 2d 316, which identified the conduct prohibited with such specificity that a citizen might know what he cannot do. The City's reliance on decisions of the Supreme Court of the United States is limited to two:

Chaplinsky v. New Hampshire, 1951, 315 U. S. 568, upheld a state statute which had been restrictively interpreted by the Supreme Court of New Hampshire, and, as thus interpreted, reached speech outside the First Amendment guarantee. Implicit in *Chaplinsky* is the suggestion

that the state court to which the matter was first presented did not correctly determine that the statute does not fairly apprise the citizen what speech is forbidden. In the state courts first considering the St. Petersburg ordinance, a declaration of its invalidity is commanded by many other decisions of the Supreme Court, including Stromberg v. California, 1931, 283 U. S. 359; Hague v. C. I. O., 1938, 307 U. S. 496; Thornhill v. Alabama, 1940, 310 U. S. 88; Winters v. N. Y., 1948, 333 U. S. 507; Cox v. Louisiana, 1965, 379 U. S. 536; Dombrowski v. Pfister, 1965, 380 U. S. 479; Ashton v. Kentucky, 1966, 384 U. S. 195.

The second case cited by the City is Cantwell v. Connecticut, 1940, 310 U. S. 296, cited only to show that not all speech is protected, a proposition with which we readily agree. But the opinion in that case does not aid the city: it is one of a large number [1] in which the Supreme Court has held a statute unconstitutional *as applied*. Whether the City of St. Petersburg may make it a crime for a citizen to call a policeman a pig is a question not before us.

The question which is before us is whether the ordinance now on the books is sufficiently precise to describe an offense so as to give fair warning to the citizen that certain speech is prohibited. If it purports to reach all verbal abuse, the ordinance is overbroad. If it does not, it clearly fails to specify what speech is prohibited. "Standards of permissible statutory vagueness are strict in the area of free expression." N. A. A. C. P. v. Button, 1963, 371 U. S. 415, 432. The St. Petersburg ordinance here in question is unconstitutional. U. S. Const. Amends. I, XIV.

---

1. *DeYonge v. Oregon*, 1937, 299 U. S. 353; *Herndon v. Lowry*, 1937, 301 U. S. 242; *Cantwell v. Connecticut*, 1940, 310 U. S. 296; *N. A. A. C. P. v. Button*, 1963, 311 U. S. 415; *Terminiello v. Chicago*, 1949, 337 U. S. 1; *Edwards v. South Carolina*, 1963, 372 U. S. 229; *Cox v. Louisiana*, 1965, 379 U. S. 559.

We cannot agree, however, with the conclusion Waller draws from our decision. There are offenses which presuppose a lawful arrest, like resisting arrest.[2] As to these, the unlawfulness of arrest is a bar. But simple assault and obscene language might lawfully be punished although they follow an unlawful arrest. We do agree that Waller is entitled to a new trial on these two offenses, since defenses based on the unlawfulness of the arrest for verbal abuse were not considered. The question is whether the conduct of Waller after his unlawful arrest was appropriate in resistance to it. The issues of provocation and unconstitutionally discriminatory enforcement of the obscenity ordinance are not briefed here, and may appropriately be considered on retrial. See Yick Wo v. Hopkins, 1886, 118 U. S. 356; Cox v. Louisiana, 1965, 379 U. S. 559.

So much of St. Petersburg ordinance 25.43.1 as reads "verbally abuse" is void.[3] The writ is granted, with directions to the Circuit Court to reverse the conviction for verbal abuse with directions for discharge and the other convictions with directions to grant a new trial.

HOBSON, *J.*, Concurs.
LILES, *A. C. J.*, Dissents.

---

2. See 4 Wharton, Criminal Procedure, Arrest, § 1628; see also 3 Wharton, *op. cit.*, Escape § 1373; id., Obstructing Justice §1285. See also 2 Wharton, *op. cit.*, Breach of the Peace § 810.

3. See Annotations, 16 L. Ed. 2d 1231; 96 L. Ed. 374; 48 A. L. R. 83; 4 A. L. R. 2d 404; Note, The Void-for-Vagueness Doctrine in the Supreme Court, 1960, 109 U. Pa. L. Rev. 67; Notes, 59 Yale L. J. 354; 61 Col. L. Rev. 1103.

ORDER.

IN THE
DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA.

IN AND FOR THE SECOND DISTRICT.

JANUARY TERM, A. D. 1971.
Thursday, April 8, 1971.

CASE NO. 69-407.

JOSEPH WALLER, JR.

Petitioner,

v.

CITY OF ST. PETERSBURG,
A MUNICIPAL CORPORATION.

Respondent.

Counsel for Respondent having filed in this cause a Petition for Rehearing and the same having been considered by the Court, it is

ORDERED that the said Petition be and the same is hereby denied.

OPINION AND ORDER.

IN THE
CIRCUIT COURT IN AND FOR
PINELLAS COUNTY, FLORIDA.

MUNICIPAL APPEALS NOS. 169, 170, 171.

CITY OF ST. PETERSBURG,
v.
JOSEPH WALLER, JR.

This is an appeal from the Municipal Court of the City of St. Petersburg, Florida. The Appellant, Joseph Waller, Jr., was the defendant in the lower Court. He was convicted of three separate offenses, appeals have been taken from all three convictions which were consolidated into this appeal. Appellant was convicted for verbal abuse of a police officer, the same being a violation of Section 25.43.1 of the City Code of the City of St. Petersburg; simple assault, as contained in Section 25.04 of the City Code of the City of St. Petersburg; and use of obscene language as contained in Section 25.42 of the City Code of the City of St. Petersburg. As a result of the findings of the lower court, the Appellant was sentenced to ninety (90) days imprisonment on each of the three offenses making a total of 270 days and it is from this finding of guilt and sentence that Appellant takes this appeal.

The Appellant raises three points in this appeal and they will be discussed in the order in which they appear in appellant's brief.

Appellant's first point on appeal is that his arrest without a warrant is unlawful in that it failed to satisfy the statutory requirements for such an arrest as set forth in F. S. A. 901.17 and 901.23. Appellant bases his contention upon the fact that Lt. Coleman of the Police Department of the City of St. Petersburg failed to advise the Appellant of the charge for which he was being arrested in violation of F. S. A. 901.17 and for failure to file a written complaint of the facts upon which the arrest was based in violation of F. S. A. 901.23.

With respect to the alleged violation of F. S. A. 901.17 this Court feels that the Statute itself clearly indicates that the person being arrested shall be informed of the cause of his arrest . . . "unless the person to be arrested is then engaged in the commission of an offense . . ." For this reason Appellant's position that he was illegally arrested in that he was not advised of why he was being arrested is totally without merit. As to the second contention, that the charges were not reduced to writing, the Court finds that the record-on-appeal clearly reflects that the charges were specified, that being verbal abuse of a police officer, and that the same was signed by Officers Trapman and Hurley of the Police Department of the City of St. Petersburg, and that such charge adequately satisfies the requirement of F. S. A. 901.23.

The Court feels compelled to cite the case of *Campbell v. Dade County*, 113 So. 2d, 708, where the following statement appears:

> ". . . The overwhelming weight of authority holds, and it is the opinion of this Court, that if the defendant is physically present before the trial court on a valid charge . . . the validity of the original arrest is immaterial . . . so far as it regards jurisdiction of the Court to proceed with the case."

It is thus the opinion of this Court that even had the arrest been illegal, as contended by Appellant, it would not detract from the validity of his conviction of the charge if it was otherwise properly tried before the trial court.

Appellant's second point contends that the portion of Section 25.43.1 of the City Code of the City of St. Petersburg, under which Appellant was convicted, is so vague as to be invalid under the due process clauses of the United States and Florida constitutions. Appellant relied substantially upon the decision of *Keyishian v. Board of Regents of New York,* 385 U. S. 589, which provides:

> "We emphasize once again that precision of regulation must be the touchstone in an area so closely touching our most precious freedoms; for standards of permissible statutory vagueness are strict in the area of free expression. . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

In addition to the Supreme Court decision of *Button v. NAACP,* 371 U. S. 415, wherein the Supreme Court requires not only that a potential offendant be properly warned by the legislative body but also the enactment not be susceptable of sweeping and improper applications. Appellant contends that the ordinance is violative of these quoted portions of the Supreme Court declarations when it states "It shall be unlawful for any person to challenge to fight, assault, strike, verbally abuse . . . a police officer in the performance of his duties."

It in the opinion of this Court that this contention of Appellant is answered four-square by the case of *City of St. Petersburg v. Calbeck,* 114 So. 2d 316. This case was decided in 1959 wherein Chief Judge Allen, speaking for the District Court of Appeal of Florida, Second District,

in determining that the disorderly conduct ordinance of the City of St. Petersburg was constitutional, cited numerous authorities, among which the following are examples:

> McQuillan Municipal Corporation, Third Edition, Sec. 24.99
>
> "It is not possible to define comprehensively 'disorderly conduct' any more than it is possible to define comprehensively misdemeanors, nuisances, police power or insulting words; each case turns upon its facts to be judicially determined."
>
> 17 Am. Jur., Disorderly Conduct, Sec. 1:
>
> "It is common practice for legislatures to authorize municipal authorities to punish acts which constitute disorderly conduct. *The condition of society in cities is such as to call for more stringent regulations than those usually provided for in the State at Large . . .*" (Emphasis added.)

16A C. J. S., *Constitutional Law*, Sec. 580 provided Judge Allen the following authority:

> "Likewise the ordinance or statute must be sufficiently explicit in its description of the acts, conduct of conditions required or forbidden to prescribe the elements of the offense with reasonable certainty and make known to those to whom it applies what conduct on their part will render them liable for its penalties. . . . A statute or ordinance which fulfills the foregoing requirements does not deny due process of law even though it is not confined to a definition of specific acts . . ."
>
> "Impossible standards are not required, however, statutory language that conveys a definite warning as to

prescribed conduct when measured by common understanding and practices satisfies due process." *U. S. v. Petrillo,* 332 U. S. 1.

The history of our society does not provide a time more critical than that facing our cities now and it is beyond comprehension that any intelligent being, that is any being capable of thought processes, could not or would not know that conduct such as that portrayed by the Appellant in the instant case, to-wit the use of the language reflected by the transcript of record-on-appeal, would not be prohibited by the City Ordinance in question, specifically when such language was designed, obviously, to arouse the passions of those within the hearing of such words, inspire hate and derision of the municipal police authorities particularly when such words were being amplified by the use of a powered megaphone.

Appellant's third point on appeal questions the propriety of the imposition of the maximum sentence on the three counts by the trial judge. In this point of the appeal the Appellant asks this Court to reduce the sentence imposed should the conviction be upheld.

This Court has, in the disposition of the first two points, upheld the conviction of the Appellant and as pointed out in Appellee's brief, the trial Court did not impose the fine provided by the ordinance in addition to the sentence nor did the trial judge impose the penalty of hard labor authorized but instead simply imposed the jail term of ninety (90) days for each offense.

It is the opinion of this Court that it would be grossly improper to insert itself into the trial of this cause without having had benefit of the observation of the witnesses or having seen and felt the nuances involved during the trial of this cause. This Court feels that the sentence imposed.

based upon the record presented to it, was eminently fair and correct and in the best interest of the entire citizenry of our community. This is particularly true when Appellant was convicted of acts which were committed at a time when our community was screaming for moderation, temperance and understanding in the social turmoil involved; when the domestic peace and the very safety of the lives of our citizens demanded that each person use all the personal restraint and cool deliberation possible to preserve and promote sober circumspection in solving the social problems. Appellant's conduct, most assuredly, was designed to the contrary to foster hate, promote unrest and for reasons of his own, attempt to influence others to work toward dissolution of proper social intercourse and to disrupt hope of peaceful community relations. This Court knows of no banner acceptable to organized society under which such conduct could be productive, useful or even tolerated.

It is therefore the judgment of this Court that the convictions and sentences of the Appellant, Joseph Waller, Jr., on all three charges, upon which this appeal was taken rendered by the City of St. Petersburg Municipal Court on August 26, 1968 be and the same are hereby affirmed.

The Clerk of the Circuit Court is directed to furnish the Clerk of the Municipal Court of the City of St. Petersburg a certified copy of this Opinion and Order.

DONE AND ORDERED, in Chambers, in Clearwater, Pinellas County, Florida, this 27th day of May, 1969.

s/ ROBERT L. WILLIAMS,
Circuit Judge.

ORDER.

IN THE

CIRCUIT COURT IN AND FOR
PINELLAS COUNTY, FLORIDA.

MUNICIPAL APPEALS NOS. 169, 170 & 171.

CITY OF ST. PETERSBURG,

v.

JOSEPH WALLER, JR.

The foregoing cause came on for consideration by this Court on Petition for Re-hearing as filed by defendant, Joseph Waller, Jr., and the Court being fully advised in the premises, it is thereupon

ORDERED, that the Petition for Re-hearing heretofore filed in this cause be and the same is hereby denied; and it is further

ORDERED, that the Clerk of Circuit Court be and he is hereby directed to furnish the Clerk of the Municipal Court of the City of St. Petersburg a certified copy of this Order.

DONE AND ORDERED, in Chambers, in Clearwater, Pinellas County, Florida, this 18th day of June, 1969.

s/ ROBERT L. WILLIAMS,
Circuit Judge.

EXTRACTS FROM TRIAL TRANSCRIPT.

[T 67-68]

MELVIN G. COLMAN, a witness herein, being first duly sworn, testified in behalf of the City as follows:

DIRECT EXAMINATION.

BY MR. LINN:

Q. Would you state your full name, please.
A. Melvin G. Colman.
Q. What is your occupation?
A. I am a Police Lieutenant for City of St. Petersburg Police Department.
Q. And on August 14, 1968, what was your capacity?
A. At that time I was the Uniformed Shift Commander for the Third Relief, which works the evening hours.
Q. You were the lieutenant then in charge of the shift?
A. Yes.
Q. All during the evening. Approximately 9:20 or 9:30 were you in the area of 22nd Street and Ninth Avenue, South?
A. Yes, sir.
Q. Just describe in your own words just exactly what happened there?
A. I was at the time in a marked patrol car, accompanied by Sgt. Fred Mein. I was proceeding northbound on 22nd Street, and as I crossed Ninth Avenue I observed a group of individuals standing on the corner of Harrington, which is the first block north of Ninth Street, the first intersection. As soon as the cruiser came into view, loud noises began emitting from this group of individuals, words that I could overhear plainly from approximately a half a block away at the time, apparently directed at us, such words as "Pig, white pig; hey, there's the pigs,

[T 68-69]

look at the pigs." I noted that one individual, whom I later recognized as I drew closer as being one Joseph Waller, a defendant in this matter, noted that he had in his hand a sound-powered megaphone, which subsequently was seized as evidence after the arrest was made. I brought the cruiser I was driving at the time, I brought the cruiser to a rolling stop at the intersection with it still pointed in a northerly direction on 22nd Street. These individuals I estimated at, the group to be about, seven or eight total, with them all screaming and gesturing in the direction of the police cruiser, which was at a stop at this point, using the terms that I have previously described, "Hey, look, there's the pigs; hey, pigs, you pigs, oink, oink, sooey, sooey," and this sort of thing.

Q. Was the defendant Joseph Waller in that group?

A. Yes, sir, he was.

Q. And when did you first notice him, and exactly what did he do?

A. As I drew closer, I recognized the defendant Waller. I have seen him in the past and knew him on sight. He was the most vocal of the group in that he had the sound-powered megaphone that he was using at the time. I made a left-hand turn, pointing the cruiser in a westerly direction, and came to a stop a short distance from the curb on Harrington Avenue. It was at this time that the defendant Waller and several other individuals, one of whom I recognized as his sister, Joyce Walker, or Joyce Waller Walker—the other defendant I did not know at the time—the defendant Waller leaned over toward the cruiser, which would be on Sgt. Mein's side. The windows were open; I could plainly hear,

[T 69-70]

and by looking at the window could see him leaning over hollering on this megaphone, "Hey, pigs; look, there's the pigs, you pigs." and so forth.

Q. Can you judge the distance between the voice end of the megaphone and your cruiser at the time this was going on?

A. Well, they had stepped down from the curb. It was probably no more than three or four feet at maximum from—

Q. They were actually in the street?

A. Yes, Sir.

Q. Was this directed toward any window of the cruiser?

A. This would have been directed toward the right-hand front side of the cruiser, which was where Sgt. Mein had been sitting.

At this point the group split. Several of the individuals started around the front of the car. The car was actually seated—would be positioned in what would be the crosswalk were it a paved street and were it marked. Several other individuals started around the rear of the car, including the defendant Waller. I stepped from the vehicle, from the passenger's—or from the driver's side, and walked toward Waller, who was approximately twelve or fourteen feet from my position. He was arrested at that point by me. He offered no immediate resistance. I took—I had a night stick with me. I took the night stick and placed it around his body and grasped the other end, thus holding him between me and the night stick. Here, too, he offered me no immediate resistance. I then walked back toward the car, and during this period of time another carload of officers arrived at the scene, Officer Trappman and several officers that were

[T 70-73]

working with him. Some of the individuals began to run from the area; some of them did not. I got Waller back to the car, and still he was not offering any physical resistance toward my arrest at the time. I reached out as if to hand him to Sgt. Mein, who had come around to my side of the car, and then I turned my attention to other matters, getting various officers in pursuit of some of the individuals who had run. There was a scuffle which broke out at this time. The defendant Waller became very vocal, used some obscenities in a loud voice, and by this time the incident was attracting other onlookers to the area. We had quite a little crowd by the time the whole thing was brought under control.

* * *

CROSS-EXAMINATION.

BY MR. BECKETT:

Q. Did you place Mr. Waller under arrest at any given time?

A. Did I place him under arrest at any given time? As I stated, he was placed under arrest when I got out of the car and approached him. He offered me no resistance.

Q. What did you say to him at that time?

A. Told him he was under arrest.

Q. Did you tell him what for?

A. No, sir.

Q. How do you account for the fact that he apparently offered no resistance initially and then afterwards did?

A. How do you account for the fact?

[T 73-74]

Q. If you do. I don't know whether you were able to observe something about the scene that would cause that change or not. Were you able to make any observations about that?

A. The only way that I can account for this fact is that we have experienced this particular type of situation, similar situations, in the past, and no arrest has been made. I think Mr. Waller was, frankly, surprised that he was going to be arrested on this occasion, and therefore he offered me no resistance. It may, too, also be that he might have recognized that I was in command, had a different type of uniform than other officers. I don't know. That's the only observation.

Q. I see. Now will you elaborate further on your statement that you think he was surprised to be arrested on this accasion?

A. How do wish me to elaborate?

Q. Well, as I recall, you said that one of the explanations that you gave for his not offering any resistance was the fact that apparently or possibly he didn't expect to be arrested.

A. That was—

Q. (Continuing.) And I just wondered why you thought that. You said that there had been similar occasions before and he had not been arrested. Is that what you said?

A. Well, similar occasions, not exactly as this. Over a period of a month of six weeks, the officers assigned to work in the predominantly Negro districts have suffered considerable verbal abuse from various individuals. However, in most instances that have been reported to me and in most instances

[T 74-75]

where I have received such abuse myself, it was not entirely possible to pick out that individual and be able to bring him before the Court and say that this abuse was directed solely at me or solely at a Police Officer, and this type of instance has occurred where an officer may be driving down the street and he feels himself that this abuse is directed at him, but there would probably be no way that he could prove it in a court of law. However, in this particular instance, I think and felt in my own mind, and I therefore arrested Mr. Waller, that there was no doubt as to who this abuse was directed at.

Q. Now when you say "this abuse," which specific abuse do you mean? I don't mean words, but I mean occasions when they were uttered, because, as I recall, the first occasion you were approximately half a block away?

A. Yes, sir.

Q. Now do you think on that occasion the abuse was directed towards you?

A. Yes, sir, I do.

Q. Well, what makes you do that?

A. Well, people were looking at us, the direction of their voice was directed in our general direction. As we proceeded up the street, they turned to follow our line of travel. As we stopped in the street, we were the only white people that I saw around. We were the only whites that I know of that were there at that particular time. We have been called "Pig" before by some of his followers. In this particular instance there was no doubt in my mind who this was directed at, and I was further con-

[T 75-76]

vinced when Mr. Waller and his followers stepped from the curb toward the cruiser and leaned over and all hollered this in a loud voice on a sound-powered megaphone. I felt there was grounds and basis for the charge, and therefore an arrest was made.

Q. And the grounds and basis were that he had yelled into the megaphone at you at the time you stopped the cruiser?

A. It was the continuing course of events, but more particularly when he stepped from the curb and leaned over and hollered this into the cruiser.

Q. I see. Now that's one thing that wasn't clear to me. You were approaching them. You were coming north?

A. Yes, sir.

Q. Approaching them, and they were coming south approaching you?

A. My first observation of them was when they were on the corner there. This is when I first observed the group. We could hear noises, but this was when my attention was directed solely at this group of individuals as opposed to others on the street.

Q. Let's put it this way: Your attention was attracted by the noise?

A. Initially, yes.

Q. And was the group moving at that time or stationary?

A. My first recollection of the group was that it was slowly moving south. My first observation of them as a group as opposed to other pedestrian traffic was as they were standing on the corner.

Q. There was other pedestrian traffic?

[T 76-77]

A. Yes.
Q. Going in both directions?
A. I don't know, didn't stop to count them or observe them. There were other people on the street, yes.
Q. Sure, but this group, how many were in this group?
A. I estimated probably seven or eight.
Q. Seven or eight, and can you say whether they were or were not moving south when you first saw them?
A. As best I recall, they were walking south, but my first recollection of them as a group, as I stated, opposed to other individuals and other pedestrian traffic, was as they were standing on the corner.
Q. Let me put it this way: The first time you saw them, they had not reached the corner?
A. No, sir.
Q. So that they did progress to the corner?
A. Yes, sir.
Q. And that was in a southerly direction?
A. Yes.
Q. In the meantime you were coming in a northerly direction?
A. Yes.
Q. And you heard these cries of "Pig" and so forth?
A. Yes.
Q. And you concluded since you were approaching them and they were approaching you, that it was addressed at you?
A. This was the initial conclusion, but as I drew closer, there was no doubt. It was not then a conclusion; it was a matter of fact.
Q. Well, what action—you then decided that you would stop because of what you had seen and heard?
A. Yes.
Q. And what was your purpose in stopping?

[T 77-78]

A. My primary purpose was to make as best I could and as certainly as I could that this was directed solely at us as no one else, and when I saw the violation of the law, as I saw it, the arrests were made at my direction.

Q. You determined to make arrest?

A. Yes, sir.

Q. And this was after they had reached the corner and you had come to the corner and stopped, and you had then heard them yell and Mr. Waller yell into the megaphone directly into your window?

A. Yes, into the window on the other side of the car.

Q. I see. Now as a matter of fact you knew that this incident was taking place, because you had previously had a conversation and a report about it, is that correct?

A. This is correct.

Q. And you came to investigate?

A. Yes, sir, I felt that if an arrest of this type was going to be made, that I should make that decision.

Q. Why was that?

A. Why was that?

Q. Yes.

A. Obviously it was going to be a controversial one, and I felt that was my responsibility, and no one else's.

Q. Why was it going to be controversial?

A. I think you could answer that question better than I could.

Q. Maybe you are correct, but would you answer for me?

A. Would you repeat the question?

[T 156-160]

Q. Yes, I think the question was why did you determine that it would be a controversial arrest?

A. Well, I think that the various events that have occurred in the City, the racial problems that we have all experienced in the last several months, I think it's a well-known fact that Mr. Waller is quite vocal in his views.

* * *

The City rests its rebuttal.

Mr. Beckett: No further testimony, Your Honor. (Argument.)

The Court: Well, thank you both for your usual thorough capable presentation.

I think, Mr. Beckett, your argument seems to agree with the general conclusion that I think inescapable here, that these offenses all occurred, the verbal abuses, the obstructing. I think we get down to two things. Thereafter it's a question of degree, of intensity, degree of seriousness, and provocation, which you have injected. I think we have to—it's inescapable that, starting off with the charge of verbal abuse, even the defendant Waller admitted the use of the word "Pig," and that the Court finds constitutes verbal abuse even if it's in its simplest sense of one utterance, and the same with the obscene language as indicated by the prosecution of the defendant Waller's admission that he used it.

* * *

This is proper for me to review your attitudes, your past conduct, before imposing sentence. Most important is your own testimony on the stand, sir,

[T 160-161]

that you are a peaceful, law-abiding man, and you would resent police enforcement of law. I can only point out, to my own observation, I don't understand a person who likes peace and is a peace-loving man to resent the police. I heard testimony about your publication that indicates militancy in your articles. You aren't sure whether you wrote them or not. I found from your own testimony and your own attitude that you have an attitude of resentment of law enforcement, and if there's going to be any peace or any progress for your people, and I certainly strongly hope for all progress that you are entitled to, and would work toward this, but we are going to have law enforcement in this community, and as long as I sit up here as a Judge, and whatever consequences may befall, I'm going to say that officers called upon in such strenuous and trying circumstances as we have today, I'm going to say that anyone that agitates and takes it upon himself to create a situation such as obviously has come into this community, I find your attitude being one that if not the leader of it, obviously definite participation in it, and I'm going to deal with it as best I can to see if I can't do something to stop it, so I'm going to sentence you to the maximum that I can under the law here. This is ninety days on each charge. The other parties will report to the Probation Officer.

THEREUPON THE TAKING OF TESTIMONY IN THIS CAUSE WAS CONCLUDED.

SEE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-227

JOSEPH WALLER, JR.,
Petitioner,

vs.

CITY OF ST. PETERSBURG, FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF

CARL R. LINN
Chief Assistant City Attorney
214 Municipal Building
St. Petersburg, Florida
Attorney for Respondent

R. L. MIDKIFF, INC., 918 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX TO BRIEF

QUESTIONS PRESENTED 1

JURISDICTION 3

STATEMENT OF THE CASE 4

ARGUMENT—

1. Whether or not the St. Petersburg Municipal Ordinance making it a crime "To . . . verbally abuse or make derogatory remarks to a policeman in the performance of his duties", is, insofar as it prohibits speech, unconstitutionally overbroad on its face under the prior decisions of this court applying the first amendment 7

2. Whether or not petitioner's conviction and jail sentence which was obtained in the Municipal Court of St. Petersburg, Florida, under a broad construction of an unconstitutionally overbroad municipal ordinance making it a crime "To . . . verbally abuse or make derogatory remarks to a police officer in the performance of his duties", may be upheld by the Florida Supreme Court by giving the challenged ordinance a narrow, constitutionally acceptable construction four years after the conviction has been obtained 10

(As restated to avoid begging facts)

Is the Federal Court bound by an acceptable, limiting construction of a state's highest court if such construction is applied to a statute governing conduct occurring prior to the construction? 10

3. Whether or not affirmance of petitioner's Municipal Court conviction by the Supreme Court

of Florida under its construction of the ordinance in question, constitutes a denial of due process under the Fourteenth Amendment by reason of the fact that there is no evidence in the record to support a conviction under such construction. (deletions to avoid begging incorrect facts) 12

4. Whether or not the imposition upon petitioner of the "maximum sentence" of ninety days in jail on each of his three convictions for "verbal abuse", "obscenity" and "simple assault", for the express purpose of punishing petitioner for his prior "militant" publications and activities and to "do something to stop it in the future", is an unconstitutional use of the sentencing power of the Municipal Court to penalize petitioner for the exercise of his First Amendment freedoms and to intimidate him and others from the future exercise of such freedoms 13

CONCLUSION 15

APPENDIX:

Extracts from trial testimony, charges AP1-17

City's Writ of Certiorari to the Florida Supreme Court AP18-23

Table of Cases Cited

Black v. *Cutter Lab.*, (Calif. 1956), 76 S.Ct. 824, 324 U.S. 292, 100 L.Ed. 1188 14

Bouie v. *Columbia*, (1964), 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697 11

Cantwell v. *Connecticut*, 310 U.S. 296, 309, 84 L.Ed. 1213, 1221, 60 S.Ct. 900 9

C. F. Harrison v. *NAACP*, 360 U.S. 167, 179, 3 L.Ed.2d 1152, 1159, 79 S.Ct. 1025 12
Cox v. *New Hampshire*, 312 U.S. 569, 85 L.Ed. 1049, 61 S.Ct. 762, 133 ALR 1396 12
Dombrowski v. *Pfister*, 380 U.S. 479, 14 L.Ed. 22 12
Groppi v. *Wisconsin*, 400 U.S. 505, 27 L.Ed.2d 571, 91 S.Ct. 490 12
Lanzetta v. *New Jersey*, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618 12
Poulos v. *New Hampshire*, 345 U.S. 395, 97 L.Ed. 1105, 73 S.Ct. 760, 30 ALR 2d 987 12
Shuttlesworth v. *Birmingham*, (1965), 382 U.S. 87, 15 L.Ed.2d 176, 86 S.Ct. 211 11
Shuttlesworth v. *City of Birmingham*, (1968), 394 U.S. 147, 22 L.Ed.2d 162, 89 S.Ct. 935 11
U. S. v. *National Dairy Products*, 372 U.S. 29, 32 (1963) 9
Winters v. *New York*, 335 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665 12

Miscellaneous

F.S.A. 924.41 (3) 14
28 USC Sec. 1257 (3) 7
St. Petersburg City Ordinance 25.4 6
St. Petersburg City Ordinance 25.42 6
St. Petersburg City Ordinance 25.43.1 ..... 6, 7

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-227

JOSEPH WALLER, JR.,
Petitioner,

vs.

CITY OF ST. PETERSBURG, FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF

QUESTIONS PRESENTED

1) WHETHER OR NOT THE ST. PETERSBURG MUNICIPAL ORDINANCE MAKING IT A CRIME "TO . . . VERBALLY ABUSE OR MAKE DEROGATORY REMARKS TO A POLICEMAN IN THE PERFORMANCE OF HIS DUTIES", IS, INSOFAR AS IT PROHIBITS

SPEECH, UNCONSTITUTIONALLY OVERBROAD ON ITS FACE UNDER THE PRIOR DECISIONS OF THIS COURT APPLYING THE FIRST AMENDMENT.

2) WHETHER OR NOT PETITIONER'S CONVICTION AND JAIL SENTENCE WHICH WAS OBTAINED IN THE MUNICIPAL COURT OF ST. PETERSBURG, FLORIDA, UNDER A BROAD CONSTRUCTION OF AN UNCONSTITUTIONALLY OVERBROAD MUNICIPAL ORDINANCE MAKING IT A CRIME "TO . . . VERBALLY ABUSE OR MAKE DEROGATORY REMARKS TO A POLICE OFFICER IN THE PERFORMANCE OF HIS DUTIES", MAY BE UPHELD BY THE FLORIDA SUPREME COURT BY GIVING THE CHALLENGED ORDINANCE A NARROW, CONSTITUTIONALLY ACCEPTABLE CONSTRUCTION FOUR YEARS AFTER THE CONVICTION HAS BEEN OBTAINED.

(As restated to avoid begging facts)

IS THE FEDERAL COURT BOUND BY AN ACCEPTABLE, LIMITING CONSTRUCTION OF A STATE'S HIGHEST COURT IF SUCH CONSTRUCTION IS APPLIED TO A STATUTE GOVERNING CONDUCT OCCURRING PRIOR TO THE CONSTRUCTION?

3) WHETHER OR NOT AFFIRMANCE OF PETITIONER'S MUNICIPAL COURT CONVICTION BY THE SUPREME COURT OF FLORIDA UNDER ITS CONSTRUCTION OF THE ORDINANCE IN QUESTION, CONSTITUTES A DENIAL OF DUE PROCESS UNDER THE FOURTEENTH AMENDMENT BY REASON OF THE FACT THAT THERE IS NO EVIDENCE IN THE RECORD TO SUPPORT A CONVICTION UNDER SUCH CONSTRUCTION. (deletions to avoid begging incorrect facts)

4) WHETHER OR NOT THE IMPOSITION UPON PETITIONER OF THE "MAXIMUM SENTENCE" OF

NINETY DAYS IN JAIL ON EACH OF HIS THREE CONVICTIONS FOR "VERBAL ABUSE", "OBSCENITY" AND "SIMPLE ASSAULT", FOR THE EXPRESS PURPOSE OF PUNISHING PETITIONER FOR HIS PRIOR "MILITANT" PUBLICATIONS AND ACTIVITIES AND TO "DO SOMETHING TO STOP IT IN THE FUTURE", IS AN UNCONSTITUTIONAL USE OF THE SENTENCING POWER OF THE MUNICIPAL COURT TO PENALIZE PETITIONER FOR THE EXERCISE OF HIS FIRST AMENDMENT FREEDOMS AND TO INTIMIDATE HIM AND OTHERS FROM THE FUTURE EXERCISE OF SUCH FREEDOMS.

JURISDICTION

Since Petitioner had a sure remedy (28 USC Sec. 1257 (2)) by appeal, but chose discretionary statutory certiorari instead, it is obvious he had a purpose.

In certiorari he would normally have a skimpier record and perhaps could avoid the full impact of "hard-core" facts. This advantage to the petitioner of certiorari over appeal can be easily avoided by the respondent ordering up the transcript and by some member of the Supreme Court's staff reading such transcript.

There is another advantage to the petitioner. If this Court declines jurisdiction, this act of declining does not finally dispose of this case. Petitioner can then run the hierarchy of the Federal Courts in Habeas Corpus. It is for this reason that respondent urges this Court to take jurisdiction in order to conclude this case once and for all and at the same time by ruling for the City, breathe new life into Chaplinsky which is good law and needs to be ratified and distinguished after its assault by Gooding.

STATEMENT OF THE CASE

Petitioner, defendant below, is the leader of a militant organization called JOMO, for Junta of Military Organization. On the night of August 14, 1968, defendant and a group of JOMO members left their headquarters on Harrington Avenue South in the City of St. Petersburg and went looking for the police following a report that a person named Loretta Munderlyn had been arrested on 22nd Street and 7th Avenue. Defendant had with him an amplified megaphone and his followers wore the distinctive dress or uniform of their organization. A police cruiser on routine patrol first spotted the group gathered at the corner of 22nd Street and 9th Avenue. As the police car approached, people in the group yelled, "Here come the pigs. Here they come. Look at the pigs." As the car came closer the crowd began to chant, "Pig, pig." On reaching the corner of 22nd Street and 9th Avenue, abreast of the group, the cruiser slowed to a stop for a red light. At this point, defendant Waller stepped into the street, thrust his megaphone close to the front right-hand window of the police car and yelled, "Pig. White pig. Sooey, sooey." The megaphone was described as "very loud" and sufficient to be heard for blocks away. Other members of the group behind the defendant yelled, "Pig" and various obscenities at the officers in the car.

The officers radioed for a conference with the shift lieutenant, Lieutenant Colman, who met them at a corner six blocks away. Lieutenant Colman, in a patrol car with one other officer, then proceeded to the scene followed by the car that had first encountered the group. A third police car subsequently arrived so that there were a total of nine officers at the scene.

As Lieutenant Colman's car approached the group on the corner of 22nd Street, they could hear from half a block away the words, "Pig, white pig, hey, there's the pigs," shouted in their direction through a sound-powered megaphone. Defendant was using the megaphone and was the most vocal and noticeable member of the group. As the Colman car approached, the group moved down from the curb and into the street. Defendant again directed the megaphone very close to the cruiser and yelled through it at the officers inside. Some of the individuals in the group started around to the front of the car and others, including the defendant, went to the rear of the car. Lieutenant Colman met the defendant at the rear of the car and arrested him, holding him with a nightstick placed across his body and grasped at either end. Thus restrained, the defendant offered no immediate resistance. By this time, the second carload of officers had arrived at the scene. Lieutenant Colman started walking back to the car and sought to turn him over to Sergeant Mein so that he, Colman, could turn his attention to other individuals of the group. As soon as Lieutenant Colman released defendant, a scuffle broke out and the defendant became very vocal again, shouting obscenities in a loud voice and attracting other onlookers to the area. Officer Hanson assisted Sergeant Mein who was struggling with the defendant. The defendant continued cursing, yelling, spitting on the officers and yelling "White M .....-F ....." and similar obscenities. At this point, the defendant's sister broke from the crowd and grabbed one of the officers from behind. She was yelling various obscenities at the officers and was subsequently arrested. While she was struggling with the officers who were arresting the defendant, another member of defendant's group, one Fred Hamilton, broke from the crowd and grabbed Officer Hanson. During the struggle

Officer Hanson's gun was unstrapped and pulled half-way from the holster before Officer Trappman came to his assistance and arrested Hamilton.

By this time quite a crowd had collected and, as the officers left the scene with their prisoners, rocks and bottles were thrown by the crowd that had gathered. During the ride back to the police station, defendant became violent and kicked Officer Murphy, spit in his face and cursed him with various obscenities.

Defendant was charged with (1) simple assault in violation of City Ordinance 25.4; (2) obscene language in violation of City Ordinance 25.42; and (3) verbal abuse of a police officer in violation of City Ordinance 25.43.1. At the trial, defendant admitted yelling "Pig" at the police officers through the megaphone, but only after he was arrested. He denied resisting arrest, claimed he was subjected to police brutality and contended that the arrest was illegal because at the time of the arrest he was not informed of the offense against him. His counsel contended at the trial that because of defendant's reputation as a known trouble-maker, the police were out to get him and that the increased police activity in the area, including surveillance of the JOMO headquarters, constituted "provocation" for the incident. It was argued that the return of the police officers to the scene where the group was yelling "Pig" constituted entrapment, since the police thereby brought themselves "into the ambit of those words." Defendant also contended that the Ordinance proscribing verbal abuse of a police officer was unconstitutionally vague.

Defendant was tried in the Municipal Court before the Honorable Henry Esteva and found guilty on all three charges. He was sentenced to ninety (90) days imprisonment on each of the three charges. On appeal, the Circuit Court affirmed the conviction.

Defendant sought certiorari in the District Court and was successful in having Ordinance Section 25.43.1 declared unconstitutionally overbroad and specifically the language "verbal abuse" void. The District Court directed discharge of the defendant on the charge of verbal abuse and ordered a new trial on the other two convictions.

The City then processed conflict certiorari to the Supreme Court of Florida. Jurisdiction was first granted under a two-part procedure. After briefs and arguments were later heard on the merits, the Supreme Court of Florida issued its Opinion and Order quashing the writ of the District Court and remanding the cause with directions to reinstate the trial court's judgment. The Petitioner now seeks statutory certiorari under 28 USC Sec. 1257 (3).

ARGUMENT

1) Whether or Not the St. Petersburg Municipal Ordinance Making It a Crime "to . . . Verbally Abuse or Make Derogatory Remarks to a Policeman in the Performance of His Duties," Is, Insofar As It Prohibits Speech, Unconstitutionally Overbroad on Its Face under the Prior Decisions of This Court Applying the First Amendment.

The bare bones of Chaplinsky still exist to show that it was here. It was good law, allow its vestiges to remain. To reverse the highest Florida court in this a classic case for its application would result in its permanent extinction, a smoothing of the desert sands. This should not occur.

On the proper found facts, this case is a perfect example of a fitting application of Chaplinsky's fighting words exception to first amendment privileges.

It is axiomatic and hornbook law that the facts of a case cannot be retried on appeal. It is also axiomatic that the findings of the trial court, sitting as a trier of facts, is entitled to the same presumption of correctness as that of a jury. It is only when there is no competent, substantial evidence in the record to support a verdict that it can be overthrown by an Appellate Court. Since the prosecution won in the trial court with overwhelming proof, it is the prosecution's facts that are the facts of this case.

It, therefore, can and should be accepted that the defendant, surrounded by an unruly and surly group, stepped into the street, projected a powerful voice amplifier almost into the open window of a police cruiser and shouted at the occupants therein "Pigs, pigs, sooey, sooey, white pigs" loud enough to be heard several blocks away, and that this act of the defendant culminated a series of similar acts that were inflaming the crowd. These are the established facts of the case (AP1-4). The supposed facts taken completely from context on page 11 of petitioner's brief have no proper place as essential facts.

If any doubt has been raised by the constant editoralizing of the facts by the petitioner in his brief that this case does not have as essential facts the strongest possible "hard-core" verbal abuse, then the Court should have some member of its staff read the trial testimony in its entirety. For this purpose, a request is being made that the record, in its entirety, be transmitted to this high court.

With the above "hard-core" facts in mind, should a reasonable man know that the above conduct was proscribed by the following ordinance:

> "It shall be unlawful for any person to challenge to fight, assault, strike, *verbally abuse* or make derogatory remarks to a police officer in the performance of his duties."

See *U. S.* v. *National Dairy Products*, 372 U.S. 29, 32 (1963) for reasonable man rule.

All are presumed to know the law. Could defendant Waller, with full knowledge of this ordinance, have been misled into believing that his insults were legal? This answer is obvious. This was not a chance remark in an otherwise lawful conversation. This was not the communication of any idea, except hate and derision, as stated in *Cantwell* v. *Connecticut*, 310 U.S. 296, 309, 84 L.Ed. 1213, 1221, 60 S.Ct. 900:

> "... personal abuse is not in any proper sense communication of information or opinion safeguarded by the constitution and its punishment as a criminal act would raise no question under that instrument."

Defendant Waller could have no motive for his acts other than to berate and abuse the police and inspire hate and anger in those who watched. These same acts could, under the test of Chaplinsky, have legally constituted disorderly conduct; they were fighting words, a verbal slap in the face. This is "hard-core" conduct obviously prohibited under any construction of the ordinance.

The petitioner attempts to distinguish the instant facts from Chaplinsky's but fails to mention that Chaplinsky's facts involved a public officer, a marshal, receiving verbal abuse *in the performance of his duties* under circumstances so similar to Waller as to disallow any meaningful difference.

The Supreme Court of Florida in its well written fifteen page opinion has briefed this point so well that additional arguments and citations are unnecessary and redundant. It is set out in its entirety in petitioner's Appendix (A1) and contains citations of every Federal case pertinent to the argument.

It is submitted in closing this point that Florida's highest Court has obviously narrowed St. Petersburg's ordinance even further than the New Hampshire courts did to their statute in *Chaplinsky*.

To properly obtain a conviction under St. Petersburg's ordinance, the prosecution must prove: fighting words, fighting words hurled at a particular individual or group and tendency to inflame recipient and others to an immediate present danger of breaching the peace. All are found in the record.

2) **Whether or Not Petitioner's Municipal Conviction and Jail Sentence Which Was Obtained in the Municipal Court of St. Petersburg, Florida, under a Broad Construction of an Unconstitutionally Overbroad Municipal Ordinance Making It a Crime "To . . . Verbally Abuse or Make Derogatory Remarks to a Police Officer in the Performance of His Duties," May Be Upheld by the Florida Supreme Court by Giving the Challenged Ordinance a Narrow, Constitutionally Acceptable Construction Four Years After the Conviction Has Been Obtained.**

(As restated to avoid begging facts)

Is the Federal Court Bound by an Acceptable, Limiting Construction of a State's Highest Court If Such Construction Is Applied to a Statute Governing Conduct Occurring Prior to the Construction?

Question 2 is the only part of petitioner's brief really meriting serious discussion. On the surface it appears to have some merit; on deep examination the merit dissolves.

Petitioner cites for his only authority the two *Shuttlesworth* decisions, *Shuttlesworth* v. *City of Birmingham* (1968), 394 U.S. 147, 22 L.Ed.2d 162, 89 S.Ct. 935; *Shuttlesworth* v. *Birmingham* (1965), 382 U.S. 87, 15 L.Ed.2d 176, 86 S.Ct. 211 and *Bouie* v. *Columbia* (1964), 378 U.S. 347, 12 L.Ed.2d 894, 84 S.Ct. 1697.

Only one of the two *Shuttlesworth* decisions (*Shuttlesworth* v. *City of Birmingham*, 382 U.S. 87) hints at supporting petitioner's position. This case cites *Bouie* as its sole authority; the *Bouie* decision obviously holds the key to this important point.

The essence of *Bouie* is that if the highest Appellate Court of the State, in construing a criminal statute, upsets its previously established precedent construing a particular statute and so strains the meaning of the statute by a new and different construction as to carry it beyond common understanding, then this new act of construction is equivalent to new legislation. It is, therefore, reasoned that since new legislation cannot "ex post facto" make a previous act a crime, then it follows that its equivalent in judicial interpretation cannot do so. *Bouie*, as it stands, is obviously good law and sound reasoning. It is not, however, authority for petitioner's Point 2.

Can petitioner then find solace in *Shuttlesworth* (382 U.S. 87) as perhaps having broadened the rule of *Bouie*? The answer is no. This case carries little beyond *Bouie* as its facts and a concurring opinion in this very case states succinctly the basic law that concludes this point. This clearly shows the ruling of the case has not changed the basic law but can be distinguished from it. In his concurring opinion, Justice Brennan quotes the following; it obviously controls and settles this point:

"Moreover, because this construction delimits the statute to 'the sort of hard-core conduct' that would obviously be prohibited under any construction . . . it may be legitimately applied to such conduct occurring before that construction."

This statement carries as a citation for this statement and properly so *Dombrowski* v. *Pfister*, 380 U.S. 479, 14 L.Ed. 22. Other cases indicating that once an acceptable, limiting construction is placed on a statute, it can be applied to prior conduct are:

Poulos v. *New Hampshire*, 345 U.S. 395, 97 L.Ed. 1105, 73 S.Ct. 760, 30 ALR 2d 987;

Cox v. *New Hampshire*, 312 U.S. 569, 85 L.Ed. 1049, 61 S.Ct. 762, 133 ALR 1396;

Winters v. *New York*, 335 U.S. 507, 92 L.Ed. 840, 68 S.Ct. 665;

Lanzetta v. *New Jersey*, 306 U.S. 451, 83 L.Ed. 888, 59 S.Ct. 618;

C. F. Harrison v. *NAACP*, 360 U.S. 167, 179, 3 L.Ed.2d 1152, 1159, 79 S.Ct. 1025;

Groppi v. *Wisconsin*, 400 U.S. 505, 27 L.Ed.2d 571, 91 S.Ct. 490.

3) **Whether or Not Affirmance of Petitioner's Municipal Court Conviction by the Supreme Court of Florida under Its Construction of the Ordinance in Question, Constitutes a Denial of Due Process under the Fourteenth Amendment by Reason of the Fact That There Is No Evidence in the Record to Support a Conviction under Such Construction.** (deletions to avoid begging incorrect facts).

There is considerable doubt to the respondent that this point has been preserved for review. It was before

the Florida Supreme Court only by the rehearing motion.

Point 3 can best be answered by referring to the facts of this case, pointing out that not only was the large group with Waller incited into violence (AP1-4), but since the revolver of one police officer was partially removed from its holster by an inflamed by-stander, it can be correctly stated that they were incited to near homicide. If it had not been for the quick action of Officer Trappman in this case, a shoot-out could easily have occurred. There is ample evidence of both interference with a police officer in his duties and present danger incitement to breach of peace not only of the police officers insulted, but many others as well as the police. Many were triggered and inflamed by the fighting words used by defendant Waller not only once, but many times in order to fan the flames of hatred and incite to violence.

4) **Whether or Not the Imposition upon Petitioner of the "Maximum Sentence" of Ninety Days in Jail on Each of His Three Convictions for "Verbal Abuse", "Obscenity" and "Simple Assault", for the Express Purpose of Punishing Petitioner for His Prior "Militant" Publications and Activities and to "Do Something to Stop It in the Future", Is an Unconstitutional Use of the Sentencing Power of the Municipal Court to Penalize Petitioner for the Exercise of His First Amendment Freedoms and to Intimidate Him and Others from the Future Exercise of Such Freedoms.**

This point was not "preserved and presented for review in every Florida Court which considered the case", as stated by the petitioner. This point has never been

raised in its present form in any court which has heard this case. An attack on the severity of the sentence was made in the Circuit Court appeal under a *unique statutory proceeding* which gives that court plenary powers over sentences ordinarily not given or exercised by Appellate Courts. F.S.A. 924.41 (3) states:

> "The circuit court shall examine the record and reverse, affirm, or modify the judgment. *The circuit court may lower the sentence* imposed by the municipal court." (Emphasis supplied)

A somewhat similar point was made in the District Court. The Supreme Court of Florida heard one point and one point alone. See respondent's Appendix (AP18-23) for entire Petition for Certiorari. Even when some new issues were interjected in the Petition for Rehearing, this point was not raised by petitioner (Pet. AP16).

This case has a petitioner who is a "super-phoenix". Every time one point is put down, four more arise from the ashes. The appellate process should constantly narrow issues, not broaden them.

The Supreme Court Rules governing certiorari apparently do not provide for a Motion to Strike so the question must be answered; the answer will be short.

That the trial judge may have done some of his thinking out loud does not prove he did all of it. The few statements quoted do not in any way detract from a proper judgment in this case. "The Supreme Court reviews judgments, not opinions", *Black* v. *Cutter Lab.* (Calif. 1956), 76 S.Ct. 824, 324 U.S. 292, 100 L.Ed. 1188.

CONCLUSION

That this Court's discretionary power to hear statutory certiorari be invoked to hear the case on its merits. That questions one and two be ruled on in favor of the City of St. Petersburg on the basis that Chaplinsky is still alive, and that the Florida Supreme Court has, by an acceptable and logical interpretation, preserved the ordinance under the rule of that case. That questions three and four be concluded by ruling that they have not been properly preserved in the record.

The further ruling that a "verbal brickbat" of insulting words through a voice amplifier only a few feet away from the head of a victim is "hard-core" abuse would dispose of this case finally and conclusively on its merits.

CARL R. LINN

Attorney for Respondent City of St. Petersburg

EXTRACTS FROM TRIAL TESTIMONY, CHARGES

A. When we came abreast of them, the defendant Joseph Waller directed his voice through a megaphone directly into the right front window and stated, "Pigs, pigs, you pigs," and a few "sooeys," and a few more "pigs." He was backed up by other shouts of "Pigs" and "sooey" from the remainder of the crowd he was accompanied by. (TR-26) • • •

A. and we followed in our cruiser. It was a station wagon. We followed about a half a block behind him. As we approached Ninth Avenue again, we could see the Lieutenant's car at Harrington Avenue stopped, and again we heard through the megaphone "Pig, you pig, sooey, pig, pig." (TR-27) • • •

A. I was in a position in front of Waller. He was continuing cursing, yelling "Pig," and spitting upon me. (TR-28) • • •

Q. Would you tell us what type of obscenities he used?

A. Obscenities?

Q. Yes.

A. As Waller was struggling with Sgt. Mein and Officer Morris, he was spitting upon me and uttering, "Pig, pig, white mother-fucking pigs," all at the same time he was spitting upon me. At that time I grabbed him by the throat to shut off his wind so he couldn't spit upon me any more." (TR-29) • • •

A. As we approached Harrington, there were a group of people walking south on the west side of 22nd Street, and I could hear the words, "Pig, pig, you pig, you

pig." My attention focused on Joe Waller, who had this microphone in his hand, saying, "Pig, pig, pig" through the microphone. Lt. Colman turned left up Harrington just off 22nd, stopped the car in front of the sidewalk. Joe Waller then came up to the window of my car with the microphone and started, "You pig, you pig, you pig," right in the car.

Q. How far from your car was the mouth of this amplifying device?

A. It was outside the window. (TR-50) * * *

A. Because the only time "Pig" was yelled out there is when the Police Officers went by, and he came right up to the car with the microphone and said, "You pig, you pig," right to me and Lt.—(TR-56) * * *

A. This is the only words that I heard. At that time I grabbed him and pulled him back into the cruiser, at which time he became violent, started resisting and kicking, shouting words of obscenity at me, and spit in my face. (TR-61) * * *

Q. All right now, when you described his kicking, Officer, just—was it one leg, two legs, or describe exactly where he kicked and—

A. With both legs. As I pulled him back in the cruiser, he turned and aimed both legs at me, kicking me about the legs and waist.

Q. Did he actually make contact with you several times with his feet?

A. Yes, sir, he did.

Q. And would you step down to the—or up to the bench here, and in a low voice describe just what invectives were directed to you?

(The following proceedings were had at the bench)

A. Well, at the time that I pulled him back into the car, he says, "You mother-fucker, get your white hands off of me." Then the struggle and kicking and spitting in my face occurred. Before the spitting in the face, he made reference to my mother was a white string-haired whore. At the same time he spit in my face. That's when I struck him in the mouth with a stick to secure him.

Q. Did you actually receive spittle in your face when he spat?

A. Yes, sir, I did.

Q. You may retake the stand, please. (TR-62) * * *
(The following proceedings were had at the bench.)

A. He called Murphy's mother a "white skinny whore" and called us "white mother-fuckers."

Q. Did you—the noise of his scuffling—you were driving the vehicle, is that correct?

A. Right.

Q. You were facing forward?

A. Right. (TR-65) * * *

A. He offered no immediate resistance. I took—I had a night stick with me. I took the night stick and placed it around his body and grasped the other end, thus holding him between me and the night stick. Here, too, he offered me no immediate resistance. I then walked back toward the car, and during this period of time another carload of officers arrived at the scene, Officer Trappman and several officers that were working with him. Some of the individuals began to run

from the area; some of them did not. I got Waller back to the car, and still he was not offering any resistance toward my arrest at the time. * * * There was a scuffle which broke out at this time. The defendant Waller became very vocal, used some obscenities in a loud voice, and by this time the incident was attracting other onlookers to the area. (TR-70) * * *

A. As we stopped in the street, we were the only white people that I saw around. We were the only whites that I know of that were there at that particular time. We have been called "Pig" before by some of his followers. In this particular instance there was no doubt in my mind who this was directed at, and I was further convinced when Mr. Waller and his followers stepped from the curb toward the cruiser and leaned over and all hollered this in a loud voice on a sound-powered megaphone. I felt there was grounds and basis for the charge, and therefore an arrest was made. (TR-75) * * *

A. We followed the Lieutenant down 22nd, and we ran right into the thick of it. They started all over again, "Pig, pig, white pig," and Lt. Colman arrested the subject Waller. (TR-37) * * *

AP5

PETERSBURG
COUNTY, FLORIDA
TION / COMPLAINT

No. B 71821

CKET NO. 123515 PROPERTY NO. 163986 OFFENSE NO. 42135
IN THE MUNICIPAL COURT OF THE CITY OF ST. PETERSBURG, FLORIDA:
THE UNDERSIGNED BEING DULY SWORN UPON HIS OATH DEPOSES AND SAYS:

DATE OF CITATION: 4/21/66 TIME OF CITATION: 2145
DATE OF VIOLATION: 4/21/66 TIME OF VIOLATION: 2120
NAME: JOSEPH GL WALLER
RESIDENCE: 2450 - HARRINGTON A/S.
PLACE EMPLOYED: NOT
OCCUPATION: NONE D.O.B. 10-7-41 RACE W SEX M
CH/OP NO. — STATE — YEAR —
VEH. LIC. NO. — STATE — YEAR —
MAKE — BODY TYPE — YEAR — COLOR —
DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSE WITHIN THIS MUNICIPALITY,
NAMELY AT: HARRINGTON A/S - 22 S/S.

NAME: Joseph Waller

B 71821

SPEEDING ___ M.P.H. IN ___ M.P.H. ZONE ☐ FROM WRONG LANE
IMPROPER LEFT TURN ☐ NO SIGNAL ☐ CUT CORNER ☐ PROHIBITED
IMPROPER RIGHT TURN ☐ NO SIGNAL ☐ INTO WRONG LANE ☐ PROHIBITED ☐ FROM WRONG LANE
TRAFFIC SIGNAL VIOLATION (WHEN LIGHT TURNED RED) ☐ PASSED MIDDLE INTERSECTION ☐ MIDDLE OF INTERSECTION ☐ NOT REACHED INTERSECTION
STOP SIGN VIOLATION ☐ WRONG PLACE ☐ FAILS SPEED ☐ FASTER
IMPROPER PASSING AND LANE USAGE ☐ AT INTERSECTION ☐ CUT IN ☐ WRONG SIDE OF PAVEMENT ☐ BETWEEN TRAFFIC ☐ ON RIGHT ☐ ON GRADE ☐ LANE STRADDLING ☐ WRONG LANE ☐ ON CURVE
FAILURE TO YIELD RIGHT OF WAY ☐ FROM PRIVATE DRIVE ☐ FROM STOP/YIELD SIGN ☐ WHEN TURNING LEFT
OTHER OBSCENE LANGUAGE
IN VIOLATION OF 26.42 ☒ CITY ORD. ☐ STATE STAT.

SLIPPERY PAVEMENT ☐ WET ☐ RAIN ☐ NIGHT
DARKNESS ☐ FOG ☐ RAIN ☐ UNLIGHTED ☐ CROSS ☐ ONCOMING
OTHER TRAFFIC PRESENT ☐ PEDESTRIAN ☐ SAME DIRECTION
CAUSED PERSON TO DODGE ☐ DRIVER ☐ PEDESTRIAN
JUST MISSED ACCIDENT BY APPROX. ___ FT.
PD ☐ PI ☐ FATAL ☐
☐ PED ☐ VEHICLE ☐ HIT FIXED OBJECT ☐ RIGHT ANGLE ☐ HEAD ON ☐ SIDE SWIPE ☐ REAR END ☐ RAN OFF ROADWAY ☐ INTERSECTION

HIGHWAY TYPE: ☐ 2 LANE ☐ 3 LANE ☐ 4 LANE ☐ 4 LANE DIVIDED
AREA: ☐ RURAL ☐ RESIDENTIAL ☐ SCHOOL ☐ INDUSTRIAL ☐ BUSINESS

THE UNDERSIGNED FURTHER STATES THAT HE HAS JUST AND REASONABLE GROUNDS TO BELIEVE, AND DOES BELIEVE, THAT THE PERSON NAMED ABOVE COMMITTED THE OFFENSE HEREIN SET FORTH, CONTRARY TO LAW. SWORN TO AND SUBSCRIBED BEFORE ME

PR NO. 1197-R-55

THIS 21 DAY OF April 19 66 [signature]
(SIGNATURE OF OFFICER OR COMPLAINANT)
[signature]
(NOTARY PUBLIC) (ADDRESS OF COMPLAINANT)

COURT APPEARANCE 26 DAY OF June 19 66 AT 1 P M.
I HEREBY AFFIX MY SIGNATURE WITH THE UNDERSTANDING THAT SUCH IS NOT A PLEA OF GUILTY, BUT TO CERTIFY THAT I HAVE RECEIVED A SUMMONS COPY OF THIS CITATION AND AGREE TO APPEAR AT THE TIME AND PLACE INDICATED.

SIGNATURE: ___

AP6

IN THE MUNICIPAL COURT OF THE CITY OF ST. PETERSBURG, FLORIDA

CITATION COMPLAINT No. B-71821

CITY OF ST. PETERSBURG,

vs.

JOSEPH WALLER, JR.

Bill of Particulars

Comes now the plaintiff, City of St. Petersburg, by and through its undersigned Attorney, and brings this its Bill of Particulars in response to defendant's motion heretofore filed:

1. Any or all of the following:

(a) Any or all of the following language was used by the defendant, Joseph Waller, at or near the intersection of Harrington Avenue and 22nd Street South, St. Petersburg, Florida: "Mother Fucker", "Mother Fuckers", "White Bastards".

(b) The following language was used by the defendant, Joseph Waller, Jr., while in a motor vehicle enroute to the St. Petersburg Police Station, 1300 First Avenue North, St. Petersburg, Florida, from Harrington Avenue and 22nd Street South: "Your mother is a stringy haired white whore."

2. (a) The following persons known to the City were witnesses to the use of the language described in 1 (a) above, by the defendant, Joseph Waller, Jr.:

Lt. Mel Coleman, Sgt. Mein, Officer Hanson and Officer Morris, all of the St. Petersburg Police Dept.

The following persons may be witnesses to part or all of the language described in 1 (a) of this Bill of Particulars and to its use by the defendant, Joseph Waller, Jr., at or near the intersection of Harrington Avenue and 22nd Street South, St. Petersburg, Florida:

Officer Hurley and Officer Trappman
St. Petersburg Police Department

Fred Lewis Hamilton—2450 Harrington Avenue South

Joyce Waller Walker—2450 Harrington Avenue South

Fred Lewis Hamilton—2450 Harrington Avenue South

James Gilley—805 Private Court South

Steven C. Heatley—263 Jordan Park

Other persons whose identity is unknown to the City.

(b) The following persons, known to the City, were witnesses to the use of the language described in Paragraph 1 (b) of this Bill of Particulars by the defendant, Joseph Waller:

Officers O. Murphy and Leake, St. Petersburg Police Dept.

Joseph Waller, Jr.—2450 Harrington Avenue South

3. None.

4. Any or all of the following locations:

(a) The conduct described in Paragraph 1 (a) of this Bill of Particulars occurred on Harrington Avenue South, St. Petersburg, Florida, approximately at the intersection of Harrington Avenue South and 22nd Street South.

(b) The conduct described in Paragraph 1 (b) of this Bill of Particulars occurred while the defendant, Joseph Waller, Jr. was in a moving motor vehicle enroute to the St. Petersburg Police Station, 1300 First Avenue North, St. Petersburg, Florida, from Harrington Avenue and 22nd Street South, St. Petersburg, Florida.

.....

Michael S. Davis
Assistant City Attorney
Municipal Building
St. Petersburg, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Bill of Particulars has been furnished to Garner W. Beckett, Jr., Esq., Attorney for Defendant, 52 - Sixth Street South, St. Petersburg, Florida, by Mail, this ..... day of August, 1968.

.....

Attorney

AP9

CITY OF ST. PETERSBURG
PINELLAS COUNTY, FLORIDA
CITATION / COMPLAINT

No. B 71742

DOCKET NO. 4M3376 PROPERTY NO. K5497 OFFENSE NO. 44935
IN THE MUNICIPAL COURT OF THE CITY OF ST. PETERSBURG, FLORIDA:
THE UNDERSIGNED BEING DULY SWORN, UPON HIS OATH DEPOSES AND SAYS:

DATE OF CITATION: 11 April TIME OF CITATION: 2150
DATE OF VIOLATION: 11 April TIME OF VIOLATION: 2120
NAME: Joseph (W) Walker
RESIDENCE: 2450 Harrington Ave. So.
PLACE EMPLOYED: NOT
OCCUPATION: none D.O.B. 10-9-44 RACE N SEX M
CH/OP NO. / STATE / YEAR /
VEH. LIC. NO / STATE / YEAR /
MAKE BODY TYPE YEAR COLOR
DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSE WITHIN THIS MUNICIPALITY,
NAMELY AT: Harrington Ave & 22nd St. So.

NAME: Joseph Walker B 71742

SPEEDING M.P.H. IN M.P.H. ZONE ☐ FROM WRONG LANE
IMPROPER LEFT TURN ☐ NO SIGNAL ☐ CUT CORNER ☐ PROHIBITED
IMPROPER RIGHT TURN ☐ NO SIGNAL ☐ INTO WRONG LANE ☐ PROHIBITED ☐ FROM WRONG LANE
TRAFFIC SIGNAL VIOLATION (WHEN LIGHT TURNED RED) ☐ PASSED MIDDLE OF INTERSECTION ☐ MIDDLE OF INTERSECTION ☐ NOT REACHED INTERSECTION
STOP SIGN VIOLATION ☐ WRONG PLACE ☐ WALK SPEED ☐ FASTER
IMPROPER PASSING AND LANE USAGE ☐ AT INTERSECTION ☐ WRONG SIDE OF PAVEMENT ☐ BETWEEN TRAFFIC ☐ ON RIGHT ☐ ON GRADE ☐ LANE STRADDLING ☐ WRONG LANE ☐ ON CURVE
FAILURE TO YIELD RIGHT OF WAY ☐ FROM PRIVATE DRIVE ☐ FROM STOP/YIELD SIGN ☐ WHEN TURNING LEFT
OTHER Assault (Simple)

IN VIOLATION OF 784 ☒ CITY ORD. ☐ STATE STAT.

SLIPPERY PAVEMENT ☐ WET ☐ RAIN ☐ NIGHT
DARKNESS ☐ FOG ☐ RAIN ☐ UNLIGHTED ☐ CROSS ☐ ONCOMING
OTHER TRAFFIC PRESENT ☐ PEDESTRIAN ☐ SAME DIRECTION
CAUSED PERSON TO DODGE ☐ DRIVER ☐ PEDESTRIAN
JUST MISSED ACCIDENT
ST. APPROX. FT.
PD ☐ PI ☐ FATAL ☐
☐ PED ☐ VEHICLE ☐ HIT FIXED OBJECT ☐ RIGHT ANGLE ☐ HEAD ON ☐ SIDE SWIPE ☐ REAR END ☐ RAN OFF ROADWAY ☐ INTERSECTION

HIGHWAY TYPE: ☐ 2 LANE ☐ 3 LANE ☐ 4 LANE ☐ 4 LANE DIVIDED
AREA: ☐ RURAL ☐ RESIDENTIAL ☐ SCHOOL ☐ INDUSTRIAL ☒ BUSINESS

THE UNDERSIGNED FURTHER STATES THAT HE HAS JUST AND REASONABLE GROUNDS TO BELIEVE, AND DOES BELIEVE, THAT THE PERSON NAMED ABOVE COMMITTED THE OFFENSE HEREIN SET FORTH, CONTRARY TO LAW. SWORN TO AND SUBSCRIBED BEFORE ME

1 No

PR NO. 795-913

THIS 11th DAY OF April A.D. 19 44
(SIGNATURE OF OFFICER OR COMPLAINANT)
(NOTARY PUBLIC) (ADDRESS OF COMPLAINANT)

COURT APPEARANCE 24 DAY OF Aug 19 44 AT 2:00 P.M.
I HEREBY AFFIX MY SIGNATURE WITH THE UNDERSTANDING THAT SUCH IS NOT A PLEA OF GUILTY, BUT TO CERTIFY THAT I HAVE RECEIVED A SUMMONS COPY OF THIS CITATION AND AGREE TO APPEAR AT THE TIME AND PLACE INDICATED.

SIGNATURE: _____

LURRED COPY

AP10

IN THE MUNICIPAL COURT OF THE CITY OF ST. PETERSBURG, FLORIDA

Citation/Complaint

No. B-71742

CITY OF ST. PETERSBURG,

vs.

JOSEPH WALLER, JR.

Bill of Particulars

Comes now the plaintiff, City of St. Petersburg, by and through its undersigned attorney, and brings this its Bill of Particulars in response to the defendant's motion heretofore filed.

1. Any or all of the following:

(a) The defendant, Joseph Waller, Jr., swung a megaphone or voice amplification device at several Police Officers, to wit: Any or all of the following:

Lt. Mel Coleman, Sgt. Mein and Officer Hanson, St. Petersburg Police Department

(b) The defendant Joseph Waller, Jr., kicked and spat upon Officer O. Murphy, St. Petersburg Police Department.

2. (a) The following persons known to the City were witnesses to the assault described in 1(a) of this Bill of Particulars:

Lt. Mel Coleman, Sgt. Mein and Officer Hanson, St. Petersburg Police Department

The following persons may have witnessed the assault described in 1(a) of this Bill of Particulars:

Officers Trappman, Hurley and Morris
St. Petersburg Police Department
1300 First Avenue North, St. Petersburg, Florida

Joseph Waller—2450 Harrington Avenue South

Joyce Waller Walker—2450 Harrington Avenue South

Fred Lewis Hamilton—2450 Harrington Avenue South

James Gilley—805 Private Court South

Steven C. Heatly—263 Jordan Park

(b) The following persons known to the City were witnesses to the assault or assaults described in Paragraph 1(b) of this Bill of Particulars:

Officer O. Murphy and Officer G. Lake
St. Petersburg Police Department
1300 First Avenue North, St. Petersburg, Florida

Joseph Waller, Jr.—2450 Harrington Avenue South
St. Petersburg, Florida

3. One (1) megaphone or voice amplification device. The device is located in the Evidence Room of the St. Petersburg Police Department, 1300 First Avenue North, St. Petersburg, Florida. The custodian of said device is Lois Story, St. Petersburg Police Department.

4. (a) The assault described in Paragraph 1(a) of this Bill of Particulars occurred at the intersection of Harrington Avenue and 22nd Street South, St. Petersburg, Florida.

(b) The assault described in Paragraph 1(b) of this Bill of Particulars occurred while the defendant, Joseph Waller, Jr. was enroute to the St. Petersburg Police Station, 1300 First Avenue North, St. Petersburg, Florida, from Harrington Avenue South and 22nd Street, St. Petersburg, Florida.

.....

Michael S. Davis
Assistant City Attorney
Municipal Building
St. Petersburg, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Bill of Particulars has been furnished to Gardner Beckett, Esq., 52—Sixth Street South, St. Petersburg, Florida, Attorney for defendant, by mail, this ..... day of August, 1968.

.....

Attorney

AP13

CITY OF ST. PETERSBURG
PINELLAS COUNTY, FLORIDA
CITATION / COMPLAINT

No. B 71820

DOCKET NO. 123814 PROPERTY NO. 16394 OFFENSE NO. 4735
IN THE MUNICIPAL COURT OF THE CITY OF ST. PETERSBURG, FLORIDA:
THE UNDERSIGNED BEING DULY SWORN UPON HIS OATH DEPOSES AND SAYS:

DATE OF CITATION: 14-VIII-68 TIME OF CITATION: 2145
DATE OF VIOLATION: 14-VIII-68 TIME OF VIOLATION: 2120
NAME: VASQUEZ (F) WALKER
RESIDENCE: 2450 - 6 HARRINGTON A/S
PLACE EMPLOYED: NO 1
OCCUPATION: NONE D.O.B. 10-2-49 PLACE USA
CH/OP NO. ~~~ STATE ~~~ YEAR ~~~
VEH. LIC. NO. ~~~ STATE ~~~ YEAR ~~~
MAKE ~~~ BODY TYPE ~~~ YEAR ~~~ COLOR ~~~
DID UNLAWFULLY COMMIT THE FOLLOWING OFFENSE WITHIN THIS MUNICIPALITY,
NAMELY AT: 1 HARRINGTON A/S & 22 S/S

NAME: Joseph Waller

SPEEDING ___ M.P.H. IN ___ M.P.H. ZONE ☐ FROM WRONG LANE
IMPROPER LEFT TURN ☐ NO SIGNAL ☐ CUT CORNER ☐ PROHIBITED
IMPROPER RIGHT TURN ☐ NO SIGNAL ☐ INTO WRONG LANE ☐ PROHIBITED ☐ FROM WRONG LANE
TRAFFIC SIGNAL VIOLATION (WHEN LIGHT TURNED RED) ☐ PASSED MIDDLE OF INTERSECTION ☐ MIDDLE OF INTERSECTION ☐ NOT REACHED INTERSECTION
STOP SIGN VIOLATION ☐ WRONG PLACE ☐ WALK SPEED ☐ FASTER
IMPROPER PASSING AND LANE USAGE ☐ AT INTERSECTION ☐ CUT IN ☐ WRONG SIDE OF PAVEMENT ☐ BETWEEN TRAFFIC ☐ ON RIGHT ☐ ON GRADE ☐ LANE STRADDLING ☐ WRONG LANE ☐ ON CURVE
FAILURE TO YIELD RIGHT OF WAY ☐ FROM PRIVATE DRIVE ☐ FROM STOP / YIELD SIGN ☐ WHEN TURNING LEFT

OTHER
VERBAL ABUSE TO A POLICE OFFICER

IN VIOLATION OF 25.11.1 ☐ CITY ORD. ☐ STATE STAT.

SLIPPERY PAVEMENT ☐ WET ☐ RAIN ☐ SNOW
DARKNESS ☐ DUSK ☐ RAIN ☐ UNLIGHTED ☐ GLARE ☐ ONCOMING
OTHER TRAFFIC PRESENT ☐ PEDESTRIAN ☐ SAME DIRECTION

CAUSED PERSON TO DODGE ☐ DRIVER ☐ PEDESTRIAN
JUST MISSED ACCIDENT BY APPROX. ___ FT.

PD ☐ PI ☐ FATAL ☐
☐ PED ☐ VEHICLE ☐ HIT FIXED OBJECT ☐ RIGHT ANGLE ☒ HEAD ON ☐ SIDE SWIPE ☐ REAR END ☐ RAN OFF ROADWAY ☐ INTERSECTION

HIGHWAY TYPE: ☐ 2 LANE ☐ 3 LANE ☐ 4 LANE ☐ 4 LANE DIVIDED
AREA: ☐ RURAL ☐ RESIDENTIAL ☐ SCHOOL ☐ INDUSTRIAL ☐ BUSINESS

B 71820

THE UNDERSIGNED FURTHER STATES THAT HE HAS JUST AND REASONABLE GROUNDS TO BELIEVE, AND DOES BELIEVE, THAT THE PERSON NAMED ABOVE COMMITTED THE OFFENSE HEREIN SET FORTH, CONTRARY TO LAW. SWORN TO AND SUBSCRIBED BEFORE ME

1970

PR NO. 1197-8655

THIS 14 DAY OF Aug 19 68 [signature]
(SIGNATURE OF OFFICER OR COMPLAINANT)

[signature]
(NOTARY PUBLIC)

(ADDRESS OF COMPLAINANT)

COURT APPEARANCE 26 DAY OF Aug 19 68 AT 9 A.M.
I HEREBY AFFIX MY SIGNATURE WITH THE UNDERSTANDING THAT SUCH IS NOT A PLEA OF GUILTY, BUT TO CERTIFY THAT I HAVE RECEIVED A SUMMONS COPY OF THIS CITATION AND AGREE TO APPEAR AT THE TIME AND PLACE INDICATED.

SIGNATURE: ___

BLURRED COPY

IN THE MUNICIPAL COURT OF THE CITY OF ST. PETERSBURG, FLORIDA

Citation/Complaint B-71820

CITY OF ST. PETERSBURG

vs.

JOSEPH WALLER, JR.

Bill of Particulars

1. Any or all of the following conduct:

(a) The defendant, Joseph Waller, Jr. shouted through a megaphone or voice amplification device any or all of the following words: "You pigs, look, there's the pigs." Said words were directed at any or all of the following persons: Sgt. Mein and Lt. Mel Coleman, both of the St. Petersburg Police Department, while said officers were engaged in the performance of their official duties.

(b) The defendant Joseph Waller, Jr. shouted or said any or all of the following words: "Mother Fucker", "Mother Fuckers", "White Bastards". Said words were directed at any or all of the following Police Officers: Lt. Mel Coleman, Sgt. Mein, Officers Hanson, Hurley, Trappman, and Morris, while said officers were engaged in the performance of their official duties.

(c) The defendant, Joseph Waller, Jr., shouted or said: "Your mother is a stringy haired white whore." Said words were directed at Officer O. Murphy while said officer was engaged in the performance of his official duties.

(d) The defendant, Joseph Waller, Jr., shouted or said any or all of the following words: "Pig", "You Pigs",

"Pigs", and "Sooie". Said words were directed at any or all of the following persons: Officers Trappman, Hanson, Hurley, and Morris, all of the St. Petersburg, Police Department, 1300—1st Avenue North, St. Petersburg, Florida, while said officers were engaged in the performance of their official duties.

2. (a) The following persons known to the City were witnesses to the conduct described in 1 (a) of this Bill of Particulars:

Lt. Mel Coleman and Sgt. Mein, St. Petersburg Police Department, 1300—1st Avenue North, St. Petersburg, Florida

Joseph Waller, Jr.—2450 Harrington Avenue South

The following persons may have witnessed part or all of the conduct described in 1 (a) of this Bill of Particulars:

Officers Trappman, Hanson, Hurley, and Morris, St. Petersburg Police Department, 1300—1st Avenue North, St. Petersburg, Florida

Joyce Waller Walker—2450 Harrington Avenue South, St. Petersburg, Florida

Fred Lewis Hamilton—2450 Harrington Avenue South, St. Petersburg, Florida

James Gilley—805 Private Court South, St. Petersburg, Florida

Steven C. Heatly—263 Jordan Park, St. Petersburg, Florida

Other persons not known to City.

(b) The following persons known to the City were witnesses to the conduct described in 1 (b) of this Bill of Particulars:

The persons named in 1(b) of this Bill of Particulars.

The following persons may have witnessed part or all of the conduct described in 1 (b) of this Bill of Particulars:

The persons named in 2 (a) and not named in 1 (b) of this Bill of Particulars.

(c) The following persons were witnesses to the conduct described in 1 (c) of this Bill of Particulars:

Officer O. Murphy and Officer Leake, St. Petersburg Police Department—1300—1st Avenue North, St. Petersburg, Florida

Joseph Waller, Jr.—2450 Harrington Avenue South, St. Petersburg, Florida

(d) The following persons were witnesses to the conduct described in 1 (d) of this Bill of Particulars:

Officers Trappman, Hanson, Hurley, and Morris, St. Petersburg Police Department, 1300—1st Avenue North, St. Petersburg, Florida

3. One (1) voice amplification device known as a megaphone. Said device is located in the evidence room of the St. Petersburg Police Department. The custodian of said megaphone is Lois Story.

4. (a) and (b) The conduct described in 1 (a) and 1 (b) of this Bill of Particulars occurred on Harrington Avenue South, at approximately the intersection of Harrington Avenue South and 22nd Street, St. Petersburg, Florida.

(c) The conduct described in 1 (c) of this Bill of Particulars occurred while the defendant, Joseph Waller, Jr. was enroute via a moving motor vehicle to the St. Petersburg Police Station, 1300—1st Avenue North, St. Petersburg, Florida, from Harrington Avenue and 22nd Street South, St. Petersburg, Florida.

(d) The conduct described in 1 (d) of this Bill of Particulars occurred approximately at the intersection of Harrington Avenue South and 22nd Street South, St. Petersburg, Florida.

.....

Michael S. Davis
Assistant City Attorney
Municipal Building
St. Petersburg, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Bill of Particulars has been furnished to Gardner W. Beckett, Jr., Esq., Attorney for Defendant, 52—Sixth Street South, St. Petersburg, Florida, by mail, this ..... day of August, 1968.

.....

Attorney

IN THE
SUPREME COURT OF THE STATE OF FLORIDA

CITY OF ST. PETERSBURG, a
municipal corporation,
Petitioner,

vs.

JOSEPH WALLER, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

TO THE SUPREME COURT OF THE STATE OF FLORIDA:

Petitioner presents this its Petition for a Writ of Certiorari and states:

1. Petitioner seeks to have reviewed the Order of the District Court of Appeal, Second District, dated March 5, 1971. Petition for Rehearing was denied on April 8, 1971.

2. This Petition is presented pursuant to Article V, Section 4 of the Florida Constitution and Rule 4.5c(6), Florida Rules of Appellate Procedure.

3. Accompanying this Petition are conformed copies of so much of the record of the proceedings, including the decision that the Petitioner seeks to have reviewed, as is necessary to show jurisdiction in this Court and the brief in support of jurisdiction.

4. The facts in this case are as follows:

A police cruiser on routine patrol duty in a colored section of St. Petersburg encountered a roving gang of

negroes. The group was equipped with a powerful electronically driven megaphone. The leader of this group, the defendant, Joseph Waller, shouted an amplified "Pigs, Pigs, White Pigs, Sooey, Sooey" into the open cruiser window, directly at the police officer occupants of the cruiser as it drove by. (R-1, TR-26)

The patrolman reported the incident to the Shift Lieutenant who was also in a cruiser in the immediate area. The Lieutenant directed the first cruiser to follow him as he drove to the area where the group was gathered. Once again, the defendant, Joseph Waller, began to shout the same epithets into the speaker directly at the cruiser. (R-1, TR-27, TR-50, TR-56) When the cruiser arrived and stopped directly in the street opposite the gang, the defendant, Joseph Waller, using his amplified device, stepped into the street, and once again shouted these and similar phrases directly into the cruiser window. (R-2) The Lieutenant determined there had been and there was a continuing violation of City Ordinance 25.43.1, to wit:

> "It shall be unlawful for any person to challenge to fight, assault, strike, *verbally abuse* or make derogatory remarks to a police officer in the performance of his duties." (Emphasis supplied)

and personally made the arrest. (R-5, TR-75; R-4, TR-70)

The Lieutenant then transferred his prisoner, defendant Waller; to a patrolman who had arrived in a third cruiser, for transportation to the City Jail, and began to supervise the round-up and arrest of several more of the more unruly members of this gang who continued to heap opprobrious language upon the officers. Some of these resisted arrest, resulting in a struggle which necessitated the eventual use of billy clubs. Defendant Waller, who

was still on the scene, began to struggle, curse and spit into the face of those officers having him in custody. (R-1, TR-29; AP-4, TR-70) For this offense, he was charged with using obscene language under Ordinance 25.42. Subdued and finally on his way to the City Jail, in the custody of still another team of officers, he was well away from the original scene of difficulties when he again flared angry, kicked, cursed and spit into the face of the officer holding him in custody. (R-3, TR-62) He was charged with simple assault for this series of incidents. He was tried on all three counts in the Municipal Court of St. Petersburg and convicted. All three convictions were appealed. All three convictions were sustained in the Circuit Court. A rehearing was sought and denied.

5. On the foregoing facts, the District Court of Appeal was presented with the following point of law:

IS THE UNDERSCORED PORTION OF THE CITY OF ST. PETERSBURG ORDINANCE UNCONSTITUTIONALLY VAGUE?

> "It shall be unlawful for any person to challenge to fight, assault, strike, *verbally abuse* or make derogatory remarks to a police officer in the performance of his duties." (Emphasis supplied)

The District Court by its action in reversing the Circuit Court (which in turn had affirmed the Municipal Court) and in its written opinion directly decided that the ordinance was unconstitutionally vague.

6. The same point of law was involved in—
Nixon v. *State of Florida*, 178 So. 2d 620 (Fla. App. 1965)

decided by the Third District on September 21, 1965. In that case, the Third District specifically held a similar

ordinance constitutional and not subject to the attack of being unduly broad and vague. The pertinent portions of the same are:

> "* * * concerning abuses, obscene or profane language in the presence of anyone else, or any indecent, insulting or *abusive language* to another, or makes any threats of violence against another person." (Emphasis supplied)

7. The same point of law was involved in—

> *McArthur* v. *State of Florida,* 191 So. 2d 429 (Fla. 1966)

decided by this Court on October 24, 1966. This Court therein upheld the stated statute, to wit: FSA 317.21 and ruled it was not unconstitutionally vague and cited as authority therefor—

City of St. Petersburg v. *Calbeck,* 114 So. 2d 316 The statute therein made it unlawful for any person who is under the influence of intoxicating liquor, *when affected to the extent his normal faculties are impaired,* to drive a car. The Court held that the italicized portion was not unconstitutionally vague.

8. The same point of law was involved in—

> *Snow* v. *State of Florida,* 179 So. 2d 99 (Fla. App. 1965)

decided by the Third District in October, 1965, upholding a vagrancy ordinance as sufficiently explicit to meet the requirements of due process.

9. The same point of law was discussed at length in—

Lieberman v. *Marshall*, 236 So. 2d 120 (Fla. 1970)

and

Carlson v. *City of Tallahassee*, 240 So. 2d 866 (Fla. 1970)

In both of these cases, this Court affirmed and cited with approval the Federal Court decision of—

Chaplinsky v. *State of New Hampshire*, 315 U.S. 568, 62 Sup. Ct. 766, 86 L.Ed. 1031,

a 1942 Federal Supreme Court decision upholding under the attack of being unconstitutionally vague a New Hampshire statute prohibiting "fighting words." The statute therein specifically prohibited the addressing of any *offensive, derisive or annoying word* to any person lawfully in a public place, or to call him by any *offensive or derisive* name.

In both of the above Florida cases, this Court extensively drew from *Chaplinsky*, approved such decision, and carefully set out the law of Florida as in conformity with this case.

10. The decision of the District Court of Appeal of Florida, Second District, which this petitioner seeks to have reviewed, is in direct conflict with the above mentioned decisions of the Supreme Court and other decisions of the Court of Appeal. Because of the reasons set forth in the petitioner's brief, it is believed the petition sought to be reviewed was erroneous and that the decisions of the Supreme Court and the District Court of Appeals of Florida, First and Third Districts, are correct and should be restated by this Court as the controlling law for the State of Florida.

Wherefore, petitioner requests this Court to grant a Writ of Certiorari and enter its Order quashing the decision and order sought to be reviewed and approving the decisions of the Supreme Court and District Courts of Appeal of Florida, First and Third Districts, as correct and granting such other and further relief as shall seem right and proper to the Court.

.....

Carl R. Linn
Assistant City Attorney
Municipal Building
St. Petersburg, Florida
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for a Writ of Certiorari has been furnished to Gardner W. Beckett, Jr., Attorney for respondent, 52—6th Street South, St. Petersburg, Florida, by mail, this 29th day of April, 1971.

.....

Attorney